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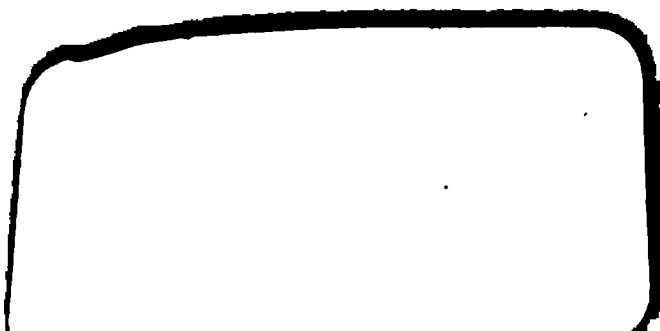
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1871







**CASES REPORTED**

**IN THE**

**Supreme Court of Appeals**

**OF**

**VIRGINIA**

**MARTIN PARKS BURKS, Reporter**

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CASES DECIDED  
IN THE  
Supreme Court of Appeals  
OF VIRGINIA.

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**Staunton.**

BROWN V. ORR AND OTHERS.

September 9, 1909.

1. **PARTNERSHIP—*Diversion of Funds—Lien on Investment.***—Where partnership funds have been used by one partner, without authority, to purchase and improve land conveyed to his wife, the land so purchased will be charged with a lien in favor of the partnership to the extent that the partnership funds have been so used and unaccounted for.
2. **HUSBAND AND WIFE—*Joint Purchase of Land—Conveyance to Wife—Husband's Interest in Property.***—Where property was purchased by husband and wife jointly, but was conveyed to the wife alone, and was afterwards sold and conveyed to a purchaser who executed his note or bond for the balance of the purchase money to them jointly, a *prima facie* case is made entitling the husband to one-half the balance of the purchase price, notwithstanding the fact that the title, in the first instance, was conveyed to the wife only.
3. **SUBROGATION—*Payment by Widow of Husband's Debts.***—A widow who has paid off debts of her deceased husband out of her own estate will be subrogated to the rights of her husband's creditors against his estate to the extent of such payment.

Appeal from a decree of the Circuit Court of Lee county.  
Decree for complainant. One of defendants appeals.

*Affirmed.*

The opinion states the case.

*Pennington Bros.*, for the appellant.

*Irvine & Morison* and *Duncan & Cridlin*, for the appellees.



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Opinion.

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BUCHANAN, J., delivered the opinion of the court.

The object of this suit was to have a settlement of the affairs of the partnership, under the firm name of Brown & Orr, which had existed between the appellant's husband, C. W. Brown, and the appellee, James W. Orr, from the year 1893 until the death of Mr. Brown in the year 1907; to subject the partnership assets to the payment of its debts; and also to subject certain real estate, or the proceeds thereof, claimed by the appellant, to the payment of said debts, upon the ground that said real estate was purchased in whole or in part with partnership funds.

The necessary accounts were directed, and a report made by one of the commissioners of the court, to which there were exceptions by both parties, and a decree entered overruling the exceptions to that report and confirming the same so far as it affected the questions involved in this appeal.

The commissioner reported that the sum of \$407.42 went into the Joslyn lot and the house constructed thereon out of the funds of the partnership, for which the appellant's husband had not accounted or charged himself on the books of Brown & Orr. There was a decree in favor of the surviving partner against the estate of the deceased partner for that sum, which was declared to be a lien on a house and lot conveyed to the appellant by W. S. Crowell and wife. It was further decreed that the estate of the deceased partner was entitled to one-half of the balance due from Mrs. Spencer, the purchaser of the Joslyn house and lot.

The action of the court in declaring that the \$407.42 was a lien on the Crowell house and lot, and that the deceased partner's estate was entitled to one-half of the balance due on the Joslyn house and lot, is assigned as erroneous.

It appears, according to the finding of the commissioner, approved by the court, and as we think sustained by the evidence, that the Joslyn lot was purchased by the appellant and her husband, although it was subsequently conveyed to the appellant

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Opinion.

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alone; that the funds of the partnership, to the extent at least of the sum of \$407.42, were used by the deceased partner in purchasing that lot and constructing the improvements thereon, which he had never accounted for or charged himself with upon the books of the firm; that a portion of the proceeds collected on the purchase price of the Joslyn house and lot, sold and conveyed to Mrs. Spencer, had been used in purchasing and improving the Crowell lot; and that the uncollected portion of the purchase price due from Mrs. Spencer on the Joslyn house and lot was evidenced by a note or bond payable to the appellant and her husband. It further appears that the deceased partner had no means when the partnership was formed, and substantially none during its existence, except his interest in that business, and that his wife did not receive more than \$312.86 from the estates of her father and her grandfather, the sources from which she claims to have acquired the means with which to purchase and pay for the Joslyn lot and make the improvements thereon.

Whether or not the facts of the case would have justified the trial court in holding that to the extent to which the said partnership effects unaccounted for by Mr. Brown and not charged to him upon the books of the firm went into the real property conveyed to the appellant and the improvements made thereon, there was a resulting trust for the benefit of the partnership, need not be considered, as the court did not so decide and the surviving partner is not claiming that it should have done so. But it held, and we think properly, that the partnership funds so used in the purchase and improvement of the land conveyed to the appellant were a charge or lien thereon. It would be against the plainest principles of justice and equity, under the facts of this case, to permit a partner to use partnership funds in paying for and improving property for the benefit of his wife, and hold that there was no charge or lien upon the property in favor of the partnership to the extent that partnership funds had been so used, and unaccounted for—especially since it appeared that the partnership assets were insufficient to pay its

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debts and the burden of paying them would fall upon the surviving partner. See *Warwick v. Warwick*, 31 Gratt. 70; *New South Building and Loan Association, &c., v. Reed*, 96 Va. 345, 31 S. E. 514, 70 Am. St. Rep. 858; *National Valley Bank v. Hancock*, 100 Va. 101, 40 S. E. 611, 93 Am. St. Rep. 933, 57 L. R. A. 728; 15 Am. & Eng. Enc. L., 1184, and cases cited in notes 1 and 3; Adams Eq., note on top pp. 110-111 (5th Am. Ed. Bispham).

The other error assigned is to the action of the court in decreeing that the estate of the appellant's husband was entitled to one-half of the balance due from Mrs. Spencer on the purchase price of the Joslyn house and lot.

That balance of purchase money was evidenced by a note or bond, payable to the appellant and her husband jointly, and while the conveyance of the Joslyn lot was to the appellant alone, the evidence shows that it was purchased jointly for her husband and herself. The purchase having been originally made for herself and husband, and when the property was sold and conveyed to Mrs. Spencer the deferred purchase money notes or bonds having been made payable to both the appellant and her husband jointly, a *prima facie* case was made entitling the husband's estate to one-half of the balance of the purchase price due from Mrs. Spencer. The appellant has not pointed out, nor have we discovered, anything in the record which shows that she and not her husband's estate was entitled to what was made payable to him.

The cross-error assigned in the appellee's brief, under Rule 8, does not seem to be much relied on, and if it were we do not think there was any error in the action of the court in decreeing that the appellant should be subrogated to the rights of her husband's creditors against his estate, to the extent that she had paid off such indebtedness out of her own means.

We are of opinion that the decree appealed from should be affirmed.

*Affirmed.*

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Statement.

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**Staunton.**

## DICKENSON AND OTHERS v. PATTON AND OTHERS.

September 9, 1909.

1. **HOMESTEADS—Property Fraudulently Conveyed—Claim by Widow and Children—Vendor's Lien—Discharge—Subrogation.**—Where property has been conveyed, directly or indirectly, by a husband to his wife, and the conveyance has been set aside at the instance of his creditors on the ground of fraud or want of consideration, the constitution of this State and the statute passed in pursuance thereof declare that the householder shall not be entitled to claim a homestead exemption in the property so conveyed; and as he cannot claim such homestead in his lifetime, his widow and children cannot claim it after his death, as their homestead rights and privileges in his property cannot be any greater than he himself had. But where it appears that the wife has been guilty of no actual fraud, and that she has, out of her own means, discharged a purchase-money lien on the property, the lien will be treated as in force for her protection, and she will be subrogated to the rights of the lienor, and be repaid the amount of the lien out of the proceeds of the sale of the property.

Appeal from a decree of the Circuit Court of Russell county in a suit in chancery wherein appellee filed a petition. Decree for petitioner. Defendants appeal.

*Reversed.*

The opinion states the case.

*L. B. Quillen, H. A. & J. K. Routh, and W. W. Bird, for the appellants.*

*J. C. Gent and R. S. Meade, for the appellees.*

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BUCHANAN, J., delivered the opinion of the court.

The question involved in this appeal is whether or not the widow of W. L. Patton, deceased, is entitled to have the house and lot mentioned in the bill and proceedings set apart as a homestead, for the benefit of herself and her minor children.

It appears that in March, 1906, W. L. Patton entered into an agreement with Wm. M. Hartsock for the purchase of a parcel of land containing four acres, at the price of about \$423.00. Mr. Patton was put in possession of the land, paid \$100.00 on the purchase price, and erected a dwellinghouse upon it at a cost of something near \$500.00 prior to January 1, 1907. About the last-mentioned date Mr. Patton, who was a member of the firm of Fugate & Patton, a partnership engaged in the mercantile business, sold his interest in the firm to his partner, who assumed its liabilities. The debts, however, were not paid; the partnership and the members thereof being insolvent. On the 14th day of January, 1907, Mr. Hartsock, the vendor of the land, with the knowledge and assent of Mr. Patton, if not at his request, conveyed it to his wife upon her payment of \$324.00, the balance of the purchase money due thereon. In order to make that payment she borrowed the money, and to secure its payment gave her note, with sureties, and also a deed of trust upon the property conveyed to her.

In the bill filed by her to restrain one of the creditors of the firm of Fugate & Patton from subjecting the house and lot to the payment of a lien which it claimed to have on the property, Mrs. Patton alleged that she was the owner of the land, and that it was not liable for her husband's debts. This was denied by the creditor. Other creditors of the firm became parties to the litigation by petition. An account was ordered to ascertain the liens upon the property. Before the account was taken Mr. Patton died. His widow filed her petition in the cause, in which it was alleged that the house and lot were worth \$800.00; that she had paid \$424.00, the purchase price of the land; that her

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husband had erected the building on the lot out of his own individual means; and asked that commissioners might be appointed to set apart his interest in the property to her and his minor children as a homestead.

Upon a hearing of the cause, the court, being of opinion that the widow and minor children were entitled to a homestead in the property, so decreed. From that decree this appeal was granted.

Unless Mr. Patton, the husband, could have claimed a homestead in the property as against the firm creditors, if the conveyance to his wife had been set aside in his lifetime because in fraud of his creditors or for want of consideration, his widow and minor children were not entitled to a homestead in it; for manifestly the widow and minor children of a householder or head of a family cannot have greater homestead privileges or rights in his property than he himself has.

By section 191 of the Constitution of 1902, clause 7, and section 3630 of Pollard's Code, it is provided that a householder or head of a family shall not be entitled to claim a homestead exemption "in any property the conveyance of which by the homestead claimant has been set aside on the ground of fraud or want of consideration."

Under the facts and circumstances disclosed by the record in this case, there is no question that the conveyance of the house and lot to Mrs. Patton by Mr. Hartsock, her husband's vendor, was without consideration to Mr. Patton, and in fraud of the rights of his creditors. If the husband had lived until the case was decided, the court would have been compelled to set aside the conveyance to his wife as in fraud of the rights of his creditors. If it were set aside on that ground, under the provisions of the Constitution and statute quoted, Mr. Patton would not have been entitled to claim a homestead in the property. The fact that he himself did not make the conveyance to his wife cannot affect the question, since it was made with his knowledge and consent, if not at his request, by his vendor for the purpose

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of clothing his wife with property rights which belonged to him, and which his creditors had the right to subject to the payment of their debts.

Forms are of little moment, for where fraud appears courts will generally treat the act, however evidenced, as a nullity so far as the creditors are concerned. 20 Cyc. 391, and cases cited.

The evil intended to be remedied by the constitutional and statutory provisions quoted was to prevent a debtor from fraudulently or voluntarily disposing of his property to prevent his creditors from subjecting it to their debts, without forfeiting his right to a homestead exemption in the property if the disposition made of it was afterwards set aside as fraudulent or voluntary, as was the case under the homestead laws in force at the time the Constitution of 1902 went into effect. *Shipe v. Repass*, 28 Gratt, 716; *Oppenheim v. Myers*, 99 Va., 582, 39 S. E. 218, and cases cited.

Since Mr. Patton, if he were alive, would not be entitled to a homestead in the house and lot, his widow and minor children who claim through him are not entitled to it. Pollard's Code, sec. 3636; 21 Cyc. 576.

Whilst the conveyance to Mrs. Patton must be set aside as in fraud of the rights of her husband's creditors, it does not appear that she was guilty of actual fraud in the transaction, and she will be entitled to be repaid the purchase-money lien paid off by her out of the proceeds of the sale of the property, and to have that lien treated as in force for her protection.

The decree appealed from must be reversed, and the cause remanded to the circuit court for further proceedings not in conflict with the views expressed in this opinion.

*Reversed.*

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Syllabus.

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**Staunton.****HAGAN v. TAYLOR AND OTHERS.**

September 9, 1909.

Absent, Buchanan, J.

1. **PARTITION—Parties—Legal Title in Plaintiff—Equitable Interests of Defendants.**—A party holding the legal title to the whole of a tract of land, in an undivided two-thirds of which others own the complete equitable estate, with the right to call for the legal title, may, under the liberal provisions of section 2565 <sup>2562</sup> of the Code, file a bill against such others for a partition of the whole.
2. **SPECIFIC PERFORMANCE—Rescission—Burden of Proof.**—In a suit for specific performance the burden of proofs is primarily upon the plaintiff to show that he is entitled to that redress. But where a suit for partition is based upon undisputed facts, and the defendants, by cross-bill, seek a rescission of the contract whereby they acquired title, based upon affirmative matters set up by their cross-bill, the burden of proof is on the defendants.
3. **RESCISSION—Laches.**—The general doctrine is that a suit for rescission is the counterpart of a suit for specific performance. Both are addressed to the sound discretion of the court, and in neither will relief be granted to one who has been guilty of inexcusable delay in asserting the right.
4. **FRAUDULENT CONVEYANCES—Rescission—Laches—Waiver.**—If a party intends to repudiate a contract on the ground of fraud, he should do so as soon as he discovers the fraud. If after the discovery of the fraud he treats the contract as a subsisting obligation, he will be deemed to have waived his right of repudiation. Prompt action is required when one believes himself entitled to a rescission of a contract.
5. **RESCISSION—Proof Required—Specific Performance.**—A party seeking, as plaintiff, to rescind a contract is required to make out a stronger case for the relief sought than he would be required to make if, as defendant, he were resisting specific per-



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formance of the same contract. Upon the same facts proved, he might succeed as defendant in the latter case when he would fail as plaintiff in the former.

Appeal from a decree of the Circuit Court of Wise county. Decree for defendants. Complainant appeals.

*Reversed.*

The opinion states the case.

*Bond & Bruce*, for the appellant.

*Duncan & Kelly*, for the appellees.

WHITTLE, J., delivered the opinion of the court.

On April 30, 1890, the appellant, Patrick Hagan, executed a title bond to S. N. Taylor, C. F. Flanary and George C. McElroy for the sale of lots 10, 11, 21 and 22, of Block 17, and lot 1 of Block 11, in the town of West Norton, Wise county, Virginia, "as run by A. Thompson," at the price of \$2,000, to be paid in six and twelve months with interest; and when paid the vendor agreed to convey a good title to the vendees. The following endorsement appears on the contract:

"C. F. Flanary and Geo. C. McElroy have paid their proportion of the above purchase money on said lots. I am to deliver them a deed in which my wife shall join, and take Taylor's note for his part without a lien on the lots.

"Apr. 10-91.

PATRICK HAGAN."

Hagan subsequently repurchased the undivided interest of Taylor in the lots, and in 1908 he brought a suit in equity against Taylor and Flanary, and the administrator and widow and heirs at law of McElroy, who in the meantime had died, for partition of the property.

The bill was taken for confessed as to Flanary, and Taylor answered, admitting its allegations. The administrator,

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widow and heirs at law of McElroy filed their demurrer and answer to the bill; the ground of demurrer being that the bill does not allege that Hagan conveyed the land to the purchasers and shows no such joint or common ownership between the parties as entitles him to call for partition.

The fact that the plaintiff had the legal title to the entire property, while the appellees held only the equitable title to two-thirds of it, constitutes no ground for denying partition under the liberal provisions of section 2565 of the Code.

The general doctrine is stated in 30 Cyc. 195, as follows: "*Cotenants Holding an Equitable Title Only—A General Rule*—At law the insuperable difficulty in granting a partition to the holder of an equitable title lies in the fact that courts of law, for most purposes, refuse to recognize or consider any but the legal title. In courts of chancery this difficulty does not exist, nor does it interpose any sufficient objection to the proceeding authorized by statute in most of the States. The true test for determining whether the holder of an equitable title may compel partition should, and we think does, depend on whether he has a present right of possession. If he has he may maintain partition. A claimant relying on an equitable title should allege its true character and not rely upon a purely legal interest."

Hagan held the legal title as trustee for the two-thirds undivided interest of his tenants in common; and a court of equity has plenary power under the statute to enforce that trust for their benefit.

The demurrer to the bill was rightly overruled.

The answer of the McElroys contains the affirmative allegation that, after the execution of the title bond, Hagan sold at least three of the lots included in his contract to other persons, who are now in possession and have erected houses thereon. Moreover, that the "A. Thompson plat" was never recorded, and that Hagan has caused the land to be resurveyed and again laid off into lots, blocks, streets and alleys; and that it is now im-

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possible to identify the lots and for him to comply with his contract. The respondents allege payment of the purchase money; and conclude with the prayer, that their answer may be treated as a cross-bill, that the contract be rescinded, and that Hagan be required to refund the purchase money with interest.

It appears that Hagan was under the impression that he had already made the deed. Nevertheless, on the filing of the answer and cross-bill, he promptly tendered a proper deed, conveying the property to the McElroys and Flanary, and filed it with his answer to the cross-bill. By his answer he makes specific denial of the facts alleged as grounds for rescission.

The depositions of witnesses were taken, and the circuit court passed the decree under review, rescinding the contract and directing that the purchase money be repaid with interest.

We cannot concur in the contention of the appellees, that the bill, though in form a bill for partition, is in fact a suit for specific performance in disguise. Hagan had sold to Flanary and McElroy an undivided two-thirds interest in the lots, and having received the purchase money in full, nothing remained to consummate the transaction except a conveyance to his vendees; and this he could accomplish without invoking the aid of the court, simply by the execution and delivery of a proper deed; so there was no occasion for a suit for specific performance. On the other hand, a suit to partition the land between himself and his tenants in common was necessary; and the suit is manifestly what it purports to be, namely, a suit for partition.

The significance of this question is due to its influence in determining where the burden of proof lies. If the suit were for specific performance, it would—at least primarily—rest with the plaintiff to show that he was entitled to that redress. But the suit for partition is based upon undisputed facts; while the affirmative issues presented by the cross-bill, involving as they do the right to have the contract rescinded, place the laboring oar in the hands of the appellees.

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The general doctrine is, that a suit for rescission is the counterpart of a suit for specific performance. Both are addressed to the sound discretion of the court, and in neither will relief be granted to one who has been guilty of inexcusable delay in asserting a right.

In *Preston v. Preston*, 95 U. S. 200, 24 L. Ed. 494, the court held, in a suit for specific performance, that "The delay of a party in taking proceedings to enforce such a contract for a period which would bar an action at law for the property is, except under special circumstances, such laches as disentitles him to the aid of a court of equity."

In *Slothower v. Oak Ridge Land Co.*, 27 S. E. 466, 2 Va. Dec. 506, 508, the court says: "Prompt action is essential when one believes himself entitled to the rescission of his contract."

In *Finch v. Garrett*, 109 Va., 63 S. E. 417, it was held: "When a party intends to repudiate a contract on the ground of fraud, he should do so as soon as he discovers the fraud. If after the discovery of the fraud he treats the contract as a subsisting obligation, he will be deemed to have waived his right of repudiation. Prompt action is essential when one believes himself entitled to a rescission of a contract." See also, *Max Meadows, &c. Co. v. Brady*, 92 Va. 71, 22 S. E. 845; *Hudson v. Waugh*, 93 Va. 518, 25 S. E. 530; *Hurt v. Miller*, 95 Va. 32, 27 S. E. 831; *West End Co. v. Claiborne*, 97 Va. 734, 34 S. E. 900; *Campbell v. Eastern Bldg. Asso.*, 98 Va. 729, 37 S. E. 350.

Of the degree of proof required in that class of cases, it was said in *Stearns v. Beckham*, 31 Grat. 379, 417: "A party seeking as plaintiff to rescind a contract is required to make out a stronger case for the relief sought than he would be required to make if, as defendant, he were resisting specific performance of the same contract. Upon the same facts proved, he might succeed as defendant in the latter case when he would fail as plaintiff in the former."

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The lots, as we have seen, were sold April 30, 1890; they were fully described in the survey and map made by A. Thompson; and on April 10, 1891, the entire purchase price was voluntarily paid and the vendees became entitled to a deed. It does not appear that they ever asked for a deed; and Hagan was under the impression that the deed had been made, and as soon as his attention was called to the omission, he immediately executed a proper deed and tendered it with his answer to the cross-bill. There was no suggestion of the existence of any ground for the rescission of the contract, and no demand was made for such rescission or for payment of the purchase money until this suit was brought in 1908, eighteen years after the date of the contract. It is also important to observe, that Flanary, though a party to the suit, has never appeared to defend it, and has failed to unite in the effort of his codefendants to have the sale rescinded.

In the light of our decisions on the subject, it need hardly be said that the conduct of these parties does not measure up to the high standard of diligence required of suitors by courts of equity in the exercise of this discretionary branch of their jurisdiction.

In the other aspect of the case, without stopping to review the evidence, which has been carefully considered, it is sufficient to say, that it does not sustain the charge in the cross-bill, that Hagan has sold some of the lots included in the title bond, or that there is any other obstacle in the way of compliance with the contract on his part.

We are, therefore, of opinion that the appellant is entitled to have partition of the land in question, as prayed for in his bill; and in that proceeding ample provision is made by the statute to meet the exigencies of the case and do complete justice to all parties.

The decree appealed from must be reversed, and the case remanded for further proceedings.

*Reversed.*

Opinion.

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**Staunton.**

HANSBROUGH, ADMINISTRATOR, AND OTHERS v. TRUSTEE OF  
PRESBYTERIAN CHURCH.

September 9, 1909.

1. *WILLS—Construction—Devise for Life—Power Over Fee.*—A devise of an estate for life, coupled with absolute power of disposition, either express or implied, comprehends everything, and the devisee takes the fee. This is now a canon of property in this State. *Miller v. Porterfield*, 86 Va. 881, overruled.

Appeal from a decree of the Corporation Court of the city of Roanoke. Decree in favor of one of the defendants in a suit in chancery brought by the heirs of Annie M. Moorman for a partition of the real estate whereof she died seised and possessed, and for the construction of the will of her husband, R. B. Moorman. Complainants appeal.

*Reversed.*

The opinion states the case.

*Robertson, Hall, Woods & Jackson*, for the appellants.

*Dupuy & Whittle, Scott & Buchanan* and *H. T. Parrish*, for the appellees.

HARRISON, J., delivered the opinion of the court.

This appeal involves a construction of the following provision of the will of Robert B. Moorman, deceased:

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"I hereby give and bequeath to my wife, Annie M. Moorman, all my property, both real and personal (after my debts have been paid), to have and to hold the same for her own personal use and benefit, and to use the whole of my estate during her life, if she can thereby promote her happiness and the welfare of our loved ones. Whatever amount may be unexpended at her death, I will shall be divided into five equal portions, one of which shall be for the benefit of each of my four dear children and their heirs, and the fifth portion for such beneficent purposes as my wife may select, or, she failing to express such preference, for the Home Missions Work of the Southern Presbyterian Church."

The Corporation Court of the City of Roanoke decreed that Annie M. Moorman did not take a fee simple in the estate passing under the will of her husband, subject to the payment of debts, but only a life estate, and that all of the estate of the testator which remained unexpended at the time of her death passed at once, in equal portions, in fee simple, to the five remaindermen named in the will.

This decree cannot be sustained. The case is clearly ruled by a long line of decisions of this court, of which *Randall v. Harrison*, 109 Va. 686, 64 S. E. 992, is the latest. The rule which controls these decisions, which has become a canon of property, is that an estate for life, coupled with absolute power of disposition, either express or implied, comprehends everything, and the devisee takes the fee. Further elaboration or discussion of the subject can add nothing to what has already been said in the numerous cases to which we have adverted.

In the light of these decisions, there can be no doubt that Annie M. Moorman is given by the will under construction the absolute power to use and consume the entire estate, and therefore, she took a fee simple therein.

The case of *Miller v. Porterfield*, 86 Va. 881, 11 S. E. 486, 19 Am. St. Rep. 919, is relied on to sustain the decree appealed from. That case has been practically overruled. It is in con-

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flict with the cases involving the question at issue which preceded it, and has not been followed by the numerous decisions which have succeeded it.

The decree complained of must be reversed and set aside, and the cause remanded for a decree to be entered in accordance with this opinion.

*Reversed.*



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Syllabus.

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**Staunton.****HOMESTEAD FIRE INSURANCE CO. v. ISON.**

September 9, 1909.

1. **INSURANCE—Premiums—Credit Given by Agent.**—A general agent of an insurance company who is intrusted with policies duly signed by the officers of the company, and who has power to countersign and deliver such policies, and who is responsible to the company for the premiums and collections on all policies issued by him, binds the company by an agreement to extend credit to the insured, especially when there is no provision to the contrary in the policy.
2. **TIME—Computation—Excluding First Day.**—When an act is to be performed within a specified period from or after a day named, the rule is to exclude the first day designated, and to include the last day of the specified period. So computing the time there are not thirty days between February 8, 1907, at noon and ten o'clock P. M., March 10, 1907.
3. **INSURANCE—Policy—Date of Issue.**—The time date of issue of the policy in the case in judgment is the day when it was delivered and accepted. Then it was that the minds of the parties met for the first time upon the terms of the contemplated contract. "Issued," in this connection, means when the policy is made and delivered, and is in full effect and operation.
4. **INSURANCE—Policy—"Issuance"—Inventory.**—Where the assured is required to take an inventory of his stock within thirty days from the issuance of a policy, the time date of issuance is the day of delivery of the policy to the assured, and he has the whole thirty days in which to take the inventory without avoiding his policy.
5. **INSURANCE—Cancellation of Policy—Misrepresentation of Agent.**—Where an insurance agent, by misrepresentation, secures from the wife of assured, in his absence, possession of a policy, and cancels it of his own initiative, and fails to give the assured five days' notice of such cancellation as required, before the fire, the policy must be regarded as in full force and effect at the time of the fire.

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6. **INSURANCE—“Iron Safe” Clause—Bookkeeping.**—The bookkeeping required by the “iron safe” clause in fire insurance policies begins from the date of the inventory which the assured is required to take.
7. **INSURANCE—Separation of Damaged Goods—Effect of Failure to Separate.**—The provision of the policy of insurance in this case requiring the assured, after the fire, to separate the damaged and undamaged goods is merely directory, and a failure to comply with it does not avoid the policy, but only has the effect of reducing the recovery by such amount as was lost to the company by the failure to comply.
8. **EVIDENCE—Character—General Reputation.**—Witnesses as to general character of a party must speak of his general reputation among the people who know the party, and not as to special reputation formed on a single occasion.
9. **APPEAL AND ERROR—Misleading Instructions—Harmless Error.**—This court will not reverse a judgment because the trial court gave an instruction which was not clear and was susceptible to misconstruction, if it clearly appears from the whole record that the party objecting was not prejudiced by it.

Error to a judgment of the Circuit Court of Wise county in a proceeding by motion for a judgment. Judgment for the plaintiff. Defendant assigns error.

*Affirmed.*

The opinion states the case.

*Bond & Bruce*, for the plaintiff in error.

*Morton & Parker* and *Irvine & Morison*, for the defendant in error.

HARRISON, J., delivered the opinion of the court.

In this case the plaintiff, George Ison, obtained against the defendant Fire Insurance Company a verdict and judgment for \$750.00, upon a policy issued by the company to secure the plaintiff from loss by fire of his stock of merchandise. This judgment is brought under review by the present writ of error.

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It is contended by the insurance company that the policy never became effective, because the premium was never paid.

This position is not sound. The record shows that the Appalachia Insurance Agency, composed of Brooks & Sparks, were general agents of the defendant company, with blank policies signed by the president and secretary of the company in their hands to be delivered by them to applicants for insurance. They had full authority to deliver policies, collect premiums and make rates. The policy in this case receipts the payment of the premium, \$48.00, and recites that it was issued in consideration of that premium; and further shows on its face that as between the company and the Appalachia Agency the premium in question was considered as fully paid. The plaintiff testified that when the agent delivered the policy to him he offered to pay him the whole amount in money, and was told that if he would pay \$2.00 and some potatoes, and settle an account he had against the agent on his books it would be sufficient, and that he (the agent) would trade out the balance with him, or call on him later if he needed more money. The agent says that he asked the plaintiff for \$5.00; that the latter gave him \$2.50, and said he was going to Kentucky to see about some money and would settle in full when he returned; that he told him that would be all right and delivered the policy.

The defendant was bound, in either view of the transaction. The company having given its agents full power to collect the premium, and having treated the premium as paid, cannot now call in question the transaction of its agent in extending credit to the insured for a part of the premium. The policy in this case contains no condition that it shall not be effective unless the premium be paid, and nothing to show that the payment of the premium in money is a prerequisite to the taking effect of the contract.

An agent who has power to countersign and deliver policies and who is responsible to the company for the premiums and their collection on all policies issued by him, binds the company

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by an agreement to extend credit to the insured. A valid payment may be made in other ways than in cash, if there has been an assent thereto by the insurer or its agent. 19 Cyc. 605, 606.

In the case of *Woody v. Old Dominion Insurance Co.*, 31 Gratt. 362, 31 Am. Rep. 732, where this subject is discussed by Judge Burks, the syllabus says: "The terms of the insurance company having been agreed upon between the applicant for insurance and the agent of the insurance company, the applicant tenders to the agent the money for the premiums; but the agent, living in the house and being indebted to the applicant for rent, tells him he has in his hands money belonging to him for rent, and will credit him for that amount. This was a valid payment of the premium."

In the case of *Wytheville Insurance, &c., v. Teiger*, 90 Va. 277, 18 S. E. 195, the policy provided that the company should not be liable until the premium was actually paid to it, thus making the case very much stronger in favor of the company than is the case at bar. Judge Lewis, in delivering the opinion of the court, says: "The firm of Milch, Fleishner & Co. were not only brokers, but, as just said, they were agents of the defendant company. Policies were sent to them directly from the home office, the premiums on which they were authorized to receive, and they were ostensibly authorized to waive a cash payment. Hence, when they delivered the policy in the present case, without requiring payment of the premium, the presumption is a credit was intended, and that was a waiver of the condition of prepayment. If in such a case a waiver were not implied, the delivery of the policy would be not only an unmeaning but a deceptive and fraudulent ceremony." Citing 2 May on Ins. (3rd ed.), sec. 360; *Miller v. Life Ins. Co.*, 12 Wall. 285, 20 L. Ed. 398. See also the recent case of *Life Ins. Co. v. Hairston*, 108 Va. 832, 62 S. E. 1057.

It is further contended that the plaintiff violated the clause of the policy requiring an invoice of the stock of goods to be made within thirty days from the issuance of the policy. In this

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connection will be considered plaintiff's instruction No. 2, which tells the jury that under the terms of the policy sued on the plaintiff was not required until thirty days after the issuance of the policy to take the inventory of the stock on hand; and if they believe from the evidence that it was not until the 13th day of February, 1907, or until some day after the 8th day of February, 1907, that the agent of the defendant delivered the policy in question to the plaintiff, and that on such date the minds of the parties for the first time met for a contract of insurance, and that the contract was on such date consummated, then the thirty days began to run only from such date, notwithstanding the policy bore date the 8th day of February.

The policy provided that unless an inventory of the goods mentioned therein be made within thirty days of its issuance, the policy should be null and void. It was dated February 8, 1907, and was to take effect at noon of that day. The fire occurred at eleven o'clock Sunday night of the 10th day of March, 1907.

When an act is to be performed within a specified period from or after a day named, the rule is to exclude the first day designated and to include the last day of the specified period. The great weight of authority is in favor of counting one of the days and the usual practice is to exclude the first day and include the last.

Assuming that the thirty-day period, in the case at bar, began to run from the date of the policy, and excluding that day, the last day of the period fell on Sunday. Whether or not under such circumstances Sunday is to be counted (*Bowles v. Brauer*, 89 Va. 466, 16 S. E. 356), we need express no opinion, for whether it be counted as part of the thirty days or not, the time had not expired, by one hour, at eleven o'clock Sunday night, March 10.

It is not necessary, however, to rest the conclusion that the time had not expired upon the narrow margin of the hour. The record shows that on or about February 8, the date of the

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policy, the insured and the agent discussed the subject of insurance, and \$1,000 was agreed upon as the amount for which the insured would like to have a policy. Several days later, on or about February 13, the agent returned and delivered the policy in question, and the insured then, for the first time, promised to pay the premium. Up to that time it does not appear that the rate of insurance or any of the numerous details and conditions of the contract had been considered or agreed upon. The very condition now relied on to nullify the contract was then seen and understood for the first time. When the policy was tendered, on or about February 13, the insured would have had the right to reject it. When the policy was delivered by the agent and accepted by the insured, the minds of the parties met for the first time upon the terms of a contemplated contract.

The condition under consideration was that the policy should be void unless the inventory mentioned was made within thirty days of its *issuance*. The true issuance of the policy is the day of its delivery to the insured. If the issuance of the policy meant from its date, then the provision under consideration for thirty days in which to make the inventory would, in most cases, be greatly impaired. Instead of having thirty days within which to take the inventory, by antedating the policy or delaying its delivery, the time allowed could be reduced to a few days or to none at all.

Lexicographers define "issuance" to be the act of putting, sending or giving out. The legal definition of the word is practically to the same effect—to send out officially; to deliver for use; to put into circulation. 23 Cyc. 358.

We are aware of no Virginia case directly in point; but see *Life Ins. Co. v. Hairston, supra*.

"Issued," as used in reference to the issuance of an insurance policy, means when the policy is made and delivered, and is in full effect and operation. See *Kansas Mut. Life Ins. Co. v. Coalson*, 22 Tex. Civil App. 64, 54 S. W. 388, 392; *Sisk v. Citizens Ins. Co.*, 16 Ind. App. 565, 45 N. E. 804.

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In the case last cited Chief Justice Comstock, in delivering the opinion of the court, said: "It is further urged that the allegation, 'that the plaintiff procured to be issued to her a policy of insurance,' is not equivalent to an allegation of delivery to and acceptance of such policy by the plaintiff. Conceding the learning of counsel, we think they are in error in this interpretation. A standard dictionary defines the word 'procured,' 'to acquire for one's self,' 'to cause'; and the word 'issue,' 'to deliver for use.' "

The policy in question not having been delivered and accepted by the insured until about the 13th of February, 1907, and the fire having occurred on March 10, there remained several days in which the insured could have complied with the condition requiring an inventory of the stock of goods covered by the policy.

It is further contended that the policy sued on was canceled before the fire.

The record shows that the agent, about the 28th of February got the policy from the wife of the insured, while her husband was absent, upon the pretense that he had charged too much and wanted to refund three or four dollars, promising to return it that night or the next morning. He immediately marked it canceled, and noted on the policy that he had canceled it on account of assured letting his stock run down.

The agent having secured the policy by misrepresentation, and having canceled it on his own initiative, and having failed to give the assured five days' notice, as required, before the fire, of such cancellation, the policy must be regarded as in full force and effect at the time of the fire. Instruction No. 1 for the plaintiff correctly states the law on this point.

It is further contended that no books were kept, as provided by the "Iron Safe" clause.

The record does not sustain this contention; but a sufficient answer is, that the bookkeeping had to begin only from the date of the inventory which was required to be taken, and the date

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for this, as already seen, had not expired at the date of the fire.

*Bray v. Va. F. & M. Ins. Co.*, 139 N. C. 390, 51 S. E. 922.

There is no merit in the contention that the notice of loss given to the company was insufficient. The day after the fire the insured put the claim in the hands of his attorneys, who immediately wrote and posted a letter to the Appalachia Agency, giving them notice of the fire. The agent of the company was present at the fire, and, therefore, had full knowledge of the loss. There was a delay of a few days in giving the defendant company notice, which was occasioned by the fact that the agent had procured the policy by misrepresentation, promising to return it. Due diligence, under all the circumstances, was exercised in giving notice of the loss, and this is all that is required. *Woody v. Old Dominion Ins. Co.*, 31 Gratt. 362, 31 Am. Rep. 732.

The charge that the insured did not separate the damaged and undamaged goods after the fire is not well taken. The evidence of the assured, taken as a whole, shows satisfactorily that he complied with the requirement of the policy in this respect. This provision of the policy is, however, directory, and a failure to comply with it would not avoid the policy, but would only have the effect of reducing the recovery by such amount as was lost to the company by the failure to comply.

Objection is made to the rejection of the evidence of John A. Craft. This witness was called to speak as to the general character of the assured. General reputation among the people who know the man is the issue in such a case. The witness Craft expressly states that he knows nothing about the reputation of the insured in this sense. All he professed to know was his special reputation formed on a single occasion when the insured attended court as a witness twenty miles from his home.

It is further insisted that it was error to give for the plaintiff instruction No. 4, which tells the jury that if they find for the plaintiff they shall find for three-fourths the actual cash value



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of the total stock of goods insured by the policy in question, as fixed by them, not exceeding \$1,000.

Under the terms of the policy the plaintiff was entitled to recover only three-fourths of the value of the goods damaged or destroyed by fire. It is insisted that this instruction tells the jury to find three-fourths of the stock of goods insured. The words "as fixed by them" in the instruction shows that the value of the goods destroyed was to be fixed by the jury in estimating the damages. The instruction, as framed, however, was not clear, and unexplained might have been misinterpreted. The record, however, satisfactorily shows that the defendant company suffered no prejudice by reason of this instruction. The circuit court certifies that the instruction was fully and clearly explained to the jury by counsel for the plaintiff, so that, in its opinion, the jury could not have been misled thereby. Further, the evidence abundantly sustained the conclusion of the jury, that the value of the goods destroyed was \$1,000. The plaintiff claimed \$1,600, and a disinterested witness, who was in position to know, placed the value at \$1,000, and the jury took his estimate, finding a verdict for \$750, or three-fourths of the \$1,000 valuation. It is clear from the whole record that the defendant was not prejudiced by the instruction under consideration; and where that is the case the judgment will not be disturbed. *Richmond Ry. Co. v. Garthright*, 92 Va. 627, 24 S. E. 267, 53 Am. St. Rep. 839, 32 L. R. A. 220; *Leftwich v. City of Richmond*, 100 Va. 164, 40 S. E. 651.

Other objections to instructions have been considered and disposed of in connection with the assignments of error, to which we have already directed our attention.

Upon the whole case we are of opinion that the judgment complained of must be affirmed.

*Affirmed.*

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Statement.

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**Staunton.**

## HURLEY v. CHARLES.

September 9, 1909.

1. **EJECTMENT—*Plaintiff's Title—Common Source—How Defendant Connected.***—A plaintiff in ejectment need not show title beyond the common source with the defendant. He may show that common source by proper proof, but he cannot connect the defendant with the common source of title by proof of a parol purchase of the land. Such evidence would not be admissible on the part of the defendant to sustain his case, and the plaintiff will not be allowed to make out his case by its introduction.
2. **EJECTMENT—“*Court Right*”—*Subsequent Locators.***—The use of a court order made in pursuance of section 2339 of the Code, or a “court right” as it is sometimes called, is only intended to affect those who have become locators since the date of the order, and not those who have previously acquired rights. A plaintiff in ejectment may properly be denied the right to introduce such an order unless he will avow that he will show that the defendant or those under whom he claims, were subsequent locators.

Error to a judgment of the Circuit Court of Buchanan county in an action of ejectment. Judgment for the defendant. Plaintiff assigns error.

*Affirmed.*

The opinion states the case.

*Finney & Stinson, S. M. B. Coulling and W. A. Daugherty,*  
for the plaintiff in error.

*Ayers & Smithdeal and A. A. Skeen,* for the defendant in error.

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HARRISON, J., delivered the opinion of the court.

This action of ejectment was instituted by Eli Hurley to recover of H. G. Charles an undivided moiety of a tract of land in Buchanan county.

The plaintiff derived his title from Jonathan Hurley, Jr., while the title of the defendant rested upon a deed of record from one Shade Dotson. In order to show that Jonathan Hurley, Jr., was the common source of title of both parties, and to thereby establish a prior legal title in himself, the plaintiff offered to prove that the defendant claimed under a parol sale by Jonathan Hurley, Jr., to his grantor, Shade Dotson. The action of the circuit court in sustaining the defendant's objection to the introduction of this evidence constitutes the first assignment of error; it being insisted that the plaintiff had the right to show that both the defendant and himself claimed under a common source of title.

There is no question that, in ejectment, the plaintiff need not show title beyond the common source, and that he may establish by proper proof the existence of such common source. The question here, however, is how the plaintiff may connect the defendant with such common source, or by what character of evidence it may be done. In this case the plaintiff seeks to connect the defendant with the alleged common source by proof of a mere parol contract. No authority is cited, and we have been unable to find any bearing directly upon the question whether or not a parol purchase of real estate is admissible on the part of the plaintiff to connect the defendant with a common source of title. If a parol sale of land be binding at all, it would only be an equitable claim of title, and could not be set up by the defendant as a defense in an action of ejectment. That the parol sale offered in evidence in this case by the plaintiff and rejected by the court would not have been admissible, whether such sale was enforceable in equity or not, see Code, sec. 2741; *Jennings v. Graveley*, 92 Va. 377, 23 S. E. 763.

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In the case cited it is said that "Although a defendant in ejectment may be clothed with a perfect equitable title, it is no defense as against a plaintiff holding the legal title, with immediate right of possession, unless the defendant can bring himself within the terms of the statute (section 2741, Code) requiring him to vouch a contract in writing stating the purchase and the terms thereof, signed by the vendor or his agent. The statute was dictated, not by a general, but a restrictive policy, and its scope will not be enlarged."

In *Davis v. Teays*, 3 Gratt. 283, it is held that the written contract itself must be produced to the jury, and that parol evidence of its contents is inadmissible, though it may have been lost or destroyed.

If the proof in question is not competent and admissible under the rules of evidence in ejectment to enable the defendant to sustain his case, it would hardly seem reasonable or just to allow the plaintiff to make out his case by its introduction.

The second assignment of error is to the action of the circuit court in refusing to permit the plaintiff to introduce an order of the County Court of Buchanan county, or "court right," as it is sometimes called. The bill of exception shows that the court refused to permit the introduction of this order unless the plaintiff would avow that he would show that the defendant, or those under whom he claimed, were subsequent locators. This the plaintiff refused to do.

The ruling of the court on this point was clearly in accordance with the statute under which the court order sought to be introduced was obtained. Code of Va., 1904, section 2339. That section provides, in part, as follows: "The said record shall be conclusive evidence in any controversy between the claimant thereunder and any person claiming under a location of the said land made after the date of such order."

This language is clear and needs no construction. It expressly limits the use of the court order as evidence to those who have become locators since the date of the order. The pro-

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ceeding provided for by this statute is purely *ex parte*, without notice to anyone, and was manifestly and properly only intended to affect subsequent locators of the same land, and not those who had previously acquired rights. In view of the refusal of the plaintiff to avow that the defendant claimed by reason of rights acquired subsequent to the date of the court order sought to be introduced, it was proper to reject such order as evidence.

The judgment must be affirmed.

*Affirmed.*

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Syllabus.

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**Staunton.****HURLEY v. HURLEY.**

September 9, 1909.

1. **STANDING TREES—When Considered Real Estate—Statute of Frauds.**  
Independently of statute, a contract for the sale of growing trees, which are to remain upon the land for a time for the purpose of further growth and profit, is a contract for the sale of an interest in land, and must be proved by a writing. But if the trees are to be severed immediately, or within a reasonable or convenient time, with a mere license to enter and take them away, without any stipulation for the beneficial use meanwhile of the soil, it is a sale of goods, and need not be in writing.
2. **STANDING TREES—Branding—Effect of Statute on Title—Statute of Frauds.**—The effect of the “Act to protect the owners of timber and logs from depredation” (Acts 1893-4, p. 513, Code (1904) sec. 1906-c) is to take a contract for the sale of standing timber which has been branded in accordance with the provisions of the act out of the operation of the statute of frauds, and to invest the purchaser with the absolute title thereto. The branding is made equivalent to a conveyance and delivery of the possession by the vendor to the vendee. The act, moreover, expressly includes trees branded before as well as those branded after its passage.
3. **CONSTITUTIONAL LAW—Titles of Acts—Sufficiency—Standing Trees.**  
The object of the act mentioned in paragraph 2 above is sufficiently expressed in its title. The settled rule with reference to sufficiency of titles to statutes generally is that the constitutional provision shall be liberally construed so as to uphold the statute if practicable. All that is required is that the subjects embraced in the statute but not specified in its title shall be congruous and have natural connection with, or be germane to, the subject expressed in the title.
4. **STATUTE OF FRAUDS—Parol Contract for Sale of Land—Code, Sec. 2840.**—Section 2840, clause 6, of the Code renders parol contracts for the sale of real estate *voidable only* and not *void*.
5. **STATUTES—Curative Acts—Validity.**—The legislature has power to enact a law validating an agreement which was unenforcable

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when made. The test of the validity of curative acts which operate retrospectively is the authority of the legislature originally to have conferred the power or authorized the act.

Error to a judgment of the Circuit Court of Buchanan county in an action of trover, brought by the vendee of standing trees against his vendor, who had cut and removed them. Judgment for the defendant. Plaintiff assigns error.

*Reversed.*

The opinion states the case.

*W. A. Daugherty and S. M. B. Coulling*, for the plaintiff in error.

*J. F. Griffith and A. A. Skeen*, for the defendant in error.

WHITTLE, J., delivered the opinion of the court.

This is an action of trover, brought by the plaintiff in error, Eli Hurley, to recover of the defendant in error, James H. Hurley, damages for cutting down and converting to his own use certain standing trees alleged to be the property of the plaintiff in error.

Upon the trial the plaintiff offered to prove that in the year 1892 he purchased from the defendant by *parol contract* the trees in the declaration mentioned, paying the purchase price in full, and impressed or marked the trees which at the time were standing and growing upon the land of the defendant with his (the plaintiff's) brand or trademark. The plaintiff also offered to prove that on December 31, 1904, his brand or trademark was admitted to record in the clerk's office of the Circuit Court of Buchanan county, in accordance with the provisions of the statute.

Whereupon the defendant objected to the admission of the evidence, and the court sustained the objection, being of opinion that the facts proved were insufficient to show ownership of

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the trees in the plaintiff. The plaintiff adducing no further evidence of title, the jury returned a verdict for the defendant, upon which the court entered the judgment now under review.

Before discussing the bearing of the statute or the rights of the parties, it may not be inappropriate to review briefly the general doctrine in this jurisdiction touching contracts with respect to standing timber.

In *McCoy v. Herbert*, 9 Leigh 548, it was held that the assignee of a *written contract of sale* of standing trees to be chosen by the vendee, having selected and marked the trees, could maintain trover against the vendor for felling and converting them to his own use.

In *Stuart v. Pennis*, 91 Va. 688, 22 S. E. 509, there was a written contract for the sale of trees standing on a boundary of land described in the agreement. The vendee had the right, if he chose to exercise it, to let the trees remain standing upon the land for a period of three years. It was there held by a unanimous court that this was a sale of an *interest in land*, and the contract would be specifically enforced by a court of equity. Several years later the case was again appealed, when the court, only four judges sitting, was equally divided as to the right of the appellant to have a decree for a specific performance of the contract, and consequently no opinion was prepared; but the judges were all agreed that the decree of the circuit court dismissing the bill should have been without prejudice to the right of the appellant to institute an action at law to recover damages for a breach of the contract, and amended the decree accordingly. *Stuart v. Pennis*, 33 S. E. 1015. It seems that two of the four judges who participated in the consideration of the case at the second hearing were of opinion that the contract ought not to be specifically enforced *because of equities de hors the contract* which had developed since the first appeal. But there was no disposition on the part of the court to recede from the general statement of the law announced at the former hearing. 6 Va. L. Reg. 50.



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Professor Raleigh C. Minor, in his admirable work on Real Property (1 Min. on Real Prop., sec. 42), observes: "After the trees, grass or other *fructus naturales* are severed from the land they at once lose their character as part of the land, and become personal property. The severance may be *actual*, as by cutting down timber, or it may be *constructive*, the trees, etc., actually continuing to grow upon the soil as before. In either case, immediately after the severance the *fructus naturales* become *personalty*, though in case of a constructive severance the owner of the *fructus naturales* has an interest in the soil itself in the nature of an easement sufficient for their support and nourishment, with the right to enter upon the land to remove them. Such constructive severance occurs when the owner of the land *sells* trees growing thereon or even when he mortgages them (after the maturity of the mortgage); it also occurs when he sells the land, *excepting* the trees growing thereon. While, as just shown, a sale of the growing trees, etc., converts them at once into *personalty*, it is quite another thing to say that such sale is itself a *sale of personalty*." He then discusses the importance of the point with reference to the operation of the statute of frauds, and concludes that the weight of authority seems to be in favor of the view that a sale of trees growing upon land "is *prima facie* at least a sale of an *interest in land*, and therefore comes within the statute, unless under the agreement the title is not to pass until the products have been severed, in which case the contract is for the sale of chattels."

In further discussion of the subject as affected by the statute of frauds, the learned author, at section 1286, says: "What is the precise nature of the *land* or *interest in land* contemplated by the statute, a contract for which must be in writing, is a vexed question. The doctrine generally recognized seems to be that in contracts for the sale of things growing upon the land (*fructus naturales*), if the vendee is to have *a right to the soil* for a time, for the purpose of further growth and profit of what is sold, it is an *interest in the land*, and must be proved in writ-

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ing. But when the thing is sold in prospect of a separation from the soil immediately, or within a reasonable or convenient time, without any stipulation for the beneficial use meanwhile of the soil, but with a mere license to enter and take it away, it is to be regarded as a sale of goods only, and so not within the statute; and that notwithstanding the thing be at present attached to the soil, and although an incidental benefit may be derived to the vendee from the circumstance that the thing may remain for a time upon the land."

Independently of statute (Acts 1893-1894, p. 513; Va. Code, 1904, Sec. 1906-c.) the foregoing is a correct statement of the general rule with respect to contracts for the sale of standing trees, and is well supported by authority.

The precise terms of the contract in the instant case do not sufficiently appear to enable us to say whether the case does or does not come within the influence of the general rule. The question for our determination, therefore, involves the sufficiency of the facts sought to be proved by the plaintiff in the trial court to invest him with title to the trees in controversy under the provisions of the statute.

Subsection 2 of section 1906-c, Va. Code, 1904, after providing the mode of adopting and recording the brand or trademark of timber dealers, declares that "Nothing in this act shall be construed to prevent any person who has heretofore used any particular brand from adopting the same as his trademark, and when he shall have adopted the same as his trademark, as provided in this act, it shall apply to the trees and timber heretofore marked with such brand as well as to such as may be hereafter so marked."

Subsection 6 provides: "That the placing or impressing of such brand or trademark on a log, tree or other marketable timber shall be deemed and held to be a change of ownership and possession."

The act moreover makes it a felony for any person to "cut down a tree or knowingly to have in his possession a log or other

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timber that has been so branded without the written consent of its owner and claiming it as his own, or who shall convert it to his own use or offer to sell the same.”

It will be observed that the act, in terms, applies to standing trees, and makes the branding of them equivalent to a conveyance and delivery of the possession by the vendor to the vendee. In other words, the legal effect of the act is to take a parol contract for standing timber which has been branded out of the operation of the statute of frauds, and to invest the timber dealer with the absolute title thereto; and the act expressly includes trees branded before as well as those branded after its passage, where the timber dealer has subsequently recorded his brand or trademark in accordance with the provisions of the statute.

It is contended, however, by the defendant in error, that to give the act that construction would render it unconstitutional for two reasons: (1) Because it would violate Art. 4, Sec. 52 of the Constitution of Virginia, which declares that “No law shall embrace more than one object, which shall be expressed in its title”; and (2) because the retrospective feature of the act would violate that part of section 58 which forbids the General Assembly to pass “any law impairing the obligation of contracts.”

The title of the act is in these words: “An act to protect the owners of timber and logs from depredation.”

With respect to the sufficiency of the title of statutes generally, the settled rule is that the provision is to be liberally construed, so that, if practicable, the law may be upheld. *Ellinger v. Commonwealth*, 102 Va. 100, 45 S. E. 807. Besides, all that is required by the Constitution is “that the subjects embraced in the statute but not specified in the title shall be congruous and have natural connection with or be germane to the subject expressed in the title.” *Prison Asso. of Va. v. Ashby*, 93 Va. 667, 25 S. E. 893; *Bosang v. Building Asso.*, 96 Va. 122, 30 S. E. 440.

In considering the second contention, it must be remembered that section 2840, subsection 6 (statute of parol agreements),

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does not make void parol contracts for the sale of real estate, but simply provides that no action shall be brought on them. *Burruss v. Hines*, 94 Va. 413, 25 S. E. 875.

The test of the validity of curative acts which operate retrospectively is the authority of the legislature originally to have conferred the power or authorized the act. 8 Cyc. 1023.

In 8 Cyc. 997-8, it is said: "It is remarkable that courts have been called upon to affirm the obvious truth that a law in force at a time when a contract is made cannot impair the obligation of that contract. Only less remarkable is the frequent necessity for deciding that a law is valid which gives binding force to a voluntary agreement void or unenforceable when made. An act validating usurious loans, or an act perfecting defective conveyances, may be mentioned as examples of this class of legislation."

"Statutes which validate contracts otherwise invalid are sustained when they go no further than to bind a party by a contract which he has entered into, but which was invalid by reason of some personal inability on his part to make it, or through neglect of some legal formality, or in consequence of some ingredient in the contract forbidden by law." Cooley Const. Lim. (6th ed.) 460; *Pace v. Danville*, 25 Gratt. 11; *Smoot v. Building Asso.*, 95 Va. 682, 29 S. E. 746, 41 L. R. A. 589.

We are of opinion that the grounds of objection urged against the constitutionality of the act in question are without merit and cannot be sustained.

It follows from what has been said that the circuit court erred in excluding the evidence offered by the plaintiff in support of his title, for which error the judgment must be reversed, the verdict of the jury set aside, and the case remanded for a new trial conformable to this opinion.

*Reversed.*

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Statement.

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**Staunton.**

## INTERSTATE RAILROAD CO. v. TYREE.

September 9, 1909.

1. PLEADING—*Contributory Negligence—Matter of Defense—Negligence Per Se—Case at Bar.*—Contributory negligence is a matter of defense which the plaintiff need not negative either by his pleadings or proofs, but which the defendant must establish by a preponderance of the evidence, unless it appears from the plaintiff's own evidence. It is not to be reasonably inferred that a brakeman was guilty of negligence *per se* from the mere fact that his foot, ankle and leg were caught and crushed between cars while he was engaged in coupling them.
2. PLEADING—*Declaration—Sufficiency—Demurrer—Bill of Particulars.* If a declaration states a good cause of action (as it does in the case at bar) and the defendant desires a more particular statement of the grounds of complaint, his remedy is not by a demurrer to the declaration, but by a motion for a bill of particulars under section 3249 of the Code.
3. EVIDENCE—*Allegation of Main Facts of Negligence—Proof of Subordinate Facts.*—Where the primary or main facts constituting the negligence complained of have been sufficiently alleged in the declaration, all merely subordinate and consequential facts that can be reasonably implied by its averments are admissible in evidence to sustain the principal facts, although not stated in the declaration.
4. APPEAL AND ERROR—*Verdict Sustained by Evidence.*—The evidence in the case at bar, considered as on a demurrer to the evidence, sustains the findings of the jury, and their verdict cannot be disturbed by this court.

Error to a judgment of the Circuit Court of Wise county in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

*Affirmed.*

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Opinion.

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The opinion states the case.

*Bullitt & Chalkley*, for the plaintiff in error.

*Vicars & Peery* and *Roher, Ainsworth & Dawson* for the defendant in error.

WHITTLE, J., delivered the opinion of the court.

This action was brought by the defendant in error, Jesse Tyree, against the plaintiff in error, the Interstate Railroad Company, to recover damages for personal injuries imputed to the negligence of the defendant. The trial resulted in a verdict and judgment for the plaintiff, and to that judgment this writ of error was awarded.

The first assignment of error involves the action of the court in overruling the demurrer to the declaration. The declaration alleges that the defendant was a railroad company, and owned and operated a railroad from Stonega to Appalachia, in Wise county, Va., and used and operated on its road steam locomotives and cars for the transportation of passengers and hauling express and freight; that at the time of the injury complained of the plaintiff was a brakeman in the employment of the defendant, engaged in the physical operation of its trains in coupling cars; that it was the duty of the defendant to use due, reasonable and proper care for the safety and protection of the plaintiff, and to see that he was not injured by the negligence of the engineer and conductor of the defendant, who were in charge and control of the operation of the locomotive and cars which were then and there being coupled together by the plaintiff; that the engineer and conductor were co-employees of the plaintiff of higher grade, and were charged with the duty and power of controlling and directing the general service and immediate work of the plaintiff at the time of the injury; that the defendant did not regard its duty in that behalf, but through its

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engineer and conductor negligently, wrongfully and improperly caused a car which was then standing upon the track to be pushed with great violence against the plaintiff while in the faithful discharge of his duty of brakeman in coupling the cars together, and without negligence or fault on his part, crushing his foot, ankle and leg between the end of another car then standing on the defendant's track and the end of the car which was pushed and run against him by the conductor and engineer.

The first ground of demurrer charges that the plaintiff himself was guilty of contributory negligence. This contention proceeds upon the assumption that pleadings must be taken most strongly against the pleader, and that the fair inference to be drawn from the declaration is that the plaintiff's foot, ankle and leg were caught between the drawheads or bumpers of the two cars; and as "the law requires railroad companies to have self-couplers on all their cars, it will be presumed that this company complied with the law in that respect, \* \* \* especially where there is no charge to the contrary"; that these couplers are operated from the outside, and that a brakeman who goes in between cars to couple them is *ipso facto* guilty of contributory negligence; that if this be not a fair inference then "the declaration is too uncertain and vague, in this, that it does not explain how the plaintiff got his foot, ankle and leg between the cars, or how he got them injured."

We cannot concur in the suggestion that it is a reasonable inference, from the mere fact that a brakeman's foot, ankle and leg were caught and crushed while engaged in coupling cars, that he was guilty of negligence *per se*. The rule is well settled in this that contributory negligence is matter of defense which need not be anticipated or negatived by the plaintiff, either in his pleadings or evidence; and it is the settled rule that where the defendant relies on contributory negligence of the plaintiff to defeat the action, the burden of proving such contributory negligence rests upon him, and must be established by a prepon-

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derance of evidence, unless indeed such contributory negligence appears from the plaintiff's own evidence.

Upon the second ground, it is not pretended that the declaration does not state a cause of action, but it is said it does not sufficiently explain how the plaintiff got his foot, ankle and leg caught between the cars, or how the injury occurred.

The following analysis of a cause of action on negligence is given in 1 Shearman & Redfield on Neg. (5th ed.), sec. 5: "Negligence in the defendant and damage to the plaintiff must concur. Negligence consists in—(1) a legal duty to use care; (2) a breach of that duty; (3) the absence of distinct intention to produce the precise damage, if any, which actually follows. With this negligence, in order to sustain a civil action, there must concur: (1) Damage to the plaintiff; (2) a natural and continuous sequence, uninterruptedly connecting the breach of duty with the damage as cause and effect."

Now then, let us subject the allegations in this declaration to the test of the foregoing analysis. As we have seen, it is alleged (1) that at the time of the injury the plaintiff was a brakeman in the service of the defendant in the physical operation of its train, and in coupling its cars, and that it was the duty of the defendant to use reasonable care for his safety, and to see that he was not injured by the negligence of the engineer and conductor of the defendant, who controlled the operation of the locomotive and cars which the plaintiff was engaged in coupling; (2) that the engineer and conductor were co-employees of the plaintiff of higher grade, and were charged with the duty and clothed with power over the general service and immediate work of the plaintiff at the time of the injury; (3) that in disregard of its duty to the plaintiff, the defendant, through its engineer and conductor, negligently caused a car which was standing upon its track to be pushed with great violence against the plaintiff while in the discharge of his duty as brakeman in coupling the cars, and without negligence on his part. It does not allege that the act was done with the intention



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to produce the damage which followed, but it does allege that it was negligently done. It moreover alleges damage to the plaintiff, and, substantially, that such damage flowed from the negligence of the defendant as cause and effect.

It thus appears that the declaration contains all the essential elements of a cause of action on negligence as above defined. In such case—that is to say, when the declaration states *a good cause of action*—if the defendant desires a more particular statement of the grounds of the complaint, his remedy is not by demurrer to the declaration, but by motion for a bill of particulars under section 3249 of the Code. *Wood v. Am. Nat. Bank*, 100 Va. 306, 40 S. E. 931.

The second assignment of error is to the admission by the court, over the objection of the defendant, of the testimony of the plaintiff, that the train was backed upon him before he gave “the back-up signal.” Also to the giving of the following instruction:

“The court instructs the jury that if they believe from the evidence that the plaintiff, at the time of the injury complained of in the declaration, was an employee of the defendant company in the capacity of brakeman, and as such was engaged in the performance of the duties that devolved upon him, and that while engaged in trying to push or kick a drawhead or knuckle on a car into its position, (if they believe he was so engaged) the train crew of the defendant company, or any, or all of them, negligently caused a train of cars of defendant company to move or back up to and against the car upon which the plaintiff was trying to push or kick the drawhead into position (if they believe he was so trying), without any signal having been given by the plaintiff to move or back up the train, and that the plaintiff’s foot as a result thereof, was caught and injured, then they will find for the plaintiff, unless they believe from the evidence that the plaintiff’s own negligence contributed to the injury, and the burden is upon the defendant to prove by a pre-

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ponderance of the evidence the contributory negligence of the plaintiff."

This assignment of error, both with respect to the admission of evidence and to the giving of the instruction excepted to, proceeds upon the supposed insufficiency of the allegations in the declaration to warrant the introduction of the evidence, and the giving of the instruction founded thereon. The objection was virtually disposed of in the consideration of the first assignment of error.

Judge Buchanan, in delivering the opinion of the court in *A. & D. Ry. Co. v. Reiger*, 95 Va. 418, 428, 28 S. E. 590, 594, says: "The reason assigned in the petition and brief, why the court erred in refusing to give the instruction, is that the plaintiff was confined to the allegations in the declaration, and that he could not recover upon any other ground of negligence than that stated in his pleadings, which was that of negligently managing, directing and running its locomotive engine. It is true that he could not recover upon any other ground than that of negligently managing, conducting and running its locomotive. (*Eckles v. N. & W. Ry. Co.*, 96 Va. 69, 25 S. E. 545.) But it was not necessary for him to aver in the declaration all the facts and circumstances by which he expected to show the negligence charged. Without averring it, he had the right to show, if he could, that the whistle was not blown, nor the bell rung; that no lookout was kept; that the track was obstructed; that the locomotive was running very rapidly; the absence of a gate-man, or safety gates; or any other facts or circumstances which tended to show that the defendant was negligent in the running of its locomotive at that particular time and place, as to travelers. *Leson v. Railroad Co.*, 77 Maine 85; 3 Elliott on Railroads, sec. 1157."

So in this case, the primary or main facts having been sufficiently alleged in the declaration, all merely subordinate and consequential facts that can be reasonably implied by its aver-

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ments are admissible in evidence to sustain the principal facts. 1 Chit. Pl. (9th Am. Ed.) 224.

The last assignment of error is to the action of the court in overruling the motion of the defendant to set aside the verdict of the jury as contrary to the law and the evidence.

A comprehensive review of the evidence is not necessary. Considered from the standpoint of a demurrer to the evidence, the evidence shows that the plaintiff was a brakeman in the employment of the defendant, and at the time of the accident was engaged in coupling cars. Some 20 cars had been coupled to the engine and were brought to a standstill, leaving a space of from 6 to 10 feet between the rear end of the hindermost car and the front end of the foremost of ten empty cars, which had to be coupled to the train. It was discovered that the knuckle and drawhead of the detached car was "slewed to one side," so that the cars would not couple. The defect could not be corrected by means of the lever from the outside, but it was necessary for the brakeman to go in between the cars and adjust the knuckle and drawhead with his hands, or kick them into position with his foot. The conductor observed the defect and ordered the plaintiff to correct it; and after instructing him when he got the drawhead in position to give "the back-up signal," passed on in the direction of the engine. Thereupon the plaintiff attempted to place the drawhead, which weighed about 200 pounds, in position with his hands, but failing in his effort, he stepped back and raised his right foot to kick it into place when just as he delivered the kick, without any signal having been given, and without warning, the train was backed upon him and his right foot caught between the knuckles of the drawheads, and was so crushed and mangled as to render partial amputation of foot necessary.

In addition to the special direction of the conductor, it was shown to be the practice of the company for brakemen engaged in coupling cars to give "the back-up signal," and the train was not supposed to move until such signal had been given.

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The plaintiff had made all couplings immediately preceding the accident, and in each instance had given the customary signal. He was intent on his work, was not anticipating danger, and with his back partially turned in the direction whence the train was coming did not perceive its approach, and was prevented from hearing it by noise occasioned by a coal tippie in operation nearby.

The foregoing evidence sustains the finding of the jury, and we have no power to disturb their verdict.

Upon the whole case, we are of opinion to affirm the judgment of the circuit court.

*Affirmed.*

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Statement.

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**Stanton.**

## JACKSON v. DOTSON, RECEIVER.

September 9, 1909.

1. ASSUMPSIT—*Affidavit With Plea—Sufficiency of Affidavit—Code, Sec. 3286.*—An affidavit accompanying a plea of *non-assumpsit* "that the matters stated in the annexed plea are true" is a substantial compliance with the provisions of section 3286 of the Code requiring the defendant under certain circumstances to file an affidavit that the plaintiff is not entitled to recover anything from the defendant on the claim sued on, etc., and that is all that is necessary. The plea puts in issue the entire claim of the plaintiff, and the affidavit states that the plea is true.
2. ASSUMPSIT—*Affidavit with Plea—Waiver.*—The provision of section 3286 of the Code requiring the defendant to file an affidavit with his plea in actions of *assumpsit* where the plaintiff has sworn to the correctness of the account with his declaration was made for the benefit of the plaintiff, and may be waived by him, and will be deemed to have been waived where he not only makes no objection when the plea is tendered without a sufficient affidavit, but, though present by counsel, assents to, or accepts without objection, a continuance of the case until the next term of the court, "with leave to the defendant to file within fifteen days his grounds of defense."

Error to a judgment of the Circuit Court of Russell county in an action of *assumpsit*. Judgment for the plaintiff. Defendant assigns error.

*Reversed.*

The opinion states the case.

*Finney & Wilson*, for the plaintiff in error.

*W. W. Bird*, for the defendant in error.

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CARDWELL, J., delivered the opinion of the court.

E. Griffith Dotson having been duly appointed and qualified as receiver for the Export Lumber Company, a corporation, and having found upon the books of the corporation an account showing a balance due to it from L. F. Jackson of \$379.55, brought this action of *assumpsit* in the Circuit Court of Russell county against Jackson to recover said balance, the process being returnable to second August rules (17th of August), 1908, at which date the plaintiff filed his declaration. With the declaration an itemized statement of the account sued on was also filed, to which was attached the following affidavit in writing, purporting to comply with the provisions of section 3286 of the Code, to-wit:

“State of Virginia,

“City of Norfolk, to-wit:

“Before me, Eugene A. Bilisoly, a notary public for the city and State aforesaid, duly authorized and commissioned to administer oaths, affirmations, etc., personally appeared E. Griffith Dotson, receiver for Export Lumber Company, Incorporated, who, being duly sworn, according to law, doth depose and say, that the annexed account against L. F. Jackson is correctly copied from the books of original entry of the Export Lumber Company, Incorporated; that the charges were made in said books at or about the time of their respective dates; that the goods for which said charges were made and commissions charged were sold and delivered as charged; that the charges are correct, and the account justly due and true as stated; that there is now due and owing thereon the sum of three hundred and seventy-nine (379) dollars and fifty-five (55) cents, with interest thereon from the 18th day of May, 1907; that no part of said sum has ever been paid or in any manner settled, and that there are no deductions or set-offs of any kind, except such as are therein specified and credited, and, furthermore, the said

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Export Lumber Company, Incorporated, holds no collaterals or securities of any kind for securing the payment of said debt or claim.

“E. GRIFFITH DOTSON.

“Subscribed and sworn to before me this 27th day of July, 1908, in the city and State aforesaid.

“In testimony whereof I have hereunto set my hand and seal the day and year aforesaid.

“EUGENE A. BILISOLY,  
“Notary Public.”

The defendant not having appeared, an office judgment was entered at rules, and the cause placed by the clerk on the office judgment docket for the September term, 1908. At this term (on September 18, 1908) an order was entered as follows:

“E. Griffith Dotson, Plaintiff,

v.

*Assumpsit.*

“L. F. Jackson, Defendant.

“This day came the parties, by their attorneys, and the plea of *non-assumpsit* having been entered on a former day of this term, on motion of defendant, by counsel, he is given fifteen days in which to file his grounds of defense, and this case is continued.”

Besides this order entered at the September term, 1908, an entry was made upon the court's docket in these words: “*Non-assumpsit* 15 days to file grounds of defense and continued.”

The plea of *non-assumpsit* found with the file of court papers, and the same that was referred to in the order and in the entry on the court's docket, also just referred to, is in general terms as well as the affidavit annexed thereto purporting to have been made before a notary on the 14th of September, 1908; the

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affidavit merely reciting that affiant "made oath that the matters stated in the annexed plea are true."

At the December term of court, 1908, the plaintiff by counsel, appeared and moved the court to enter judgment against the defendant for the amount claimed in the declaration, on the ground that such judgment should have been entered at the September term, 1908, because the affidavit filed with defendant's plea of *non-assumpsit* was insufficient, and not in compliance with the requirements of the statute, which motion the court, over the objection of the defendant, sustained, and to the judgment entered accordingly this writ of error was awarded.

The first question presented by the assignments of error is whether or not the affidavit of the plaintiff attached to the account filed with and as a part of his declaration was sufficient under the statute—sec. 3286 of the Code.

In the view that we take of the case it is not necessary to pass upon that question, for if the affidavit annexed to the defendant's plea of *non-assumpsit* was a sufficient compliance with the statute, or the plaintiff had waived his right to make objection thereto when the case was called for trial at the December term, 1908, the judgment then entered is plainly erroneous.

The statute provides as to when an inquiry of damages is to be dispensed with in actions of *assumpsit* on a contract for the payment of money, express or implied, and in effect requires that there shall be no such inquiry "unless the defendant file with his plea the affidavit of himself or his agent, that the plaintiff is not entitled, as the affiant verily believes, to recover anything from the defendant on such claim, or stating a sum certain less than that set forth in the affidavit filed by the plaintiff, which, as the affiant verily believes, is all that the plaintiff is entitled to recover from the defendant." Code, Sec. 3286.

In this case, as in like cases contemplated by the statute, a plea of *non-assumpsit* denies the right of the plaintiff to recover on the claim made in his declaration, and an affidavit



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filed with the plea, "that the matters stated in the annexed plea are true," puts in issue the entire claim asserted, and is, at the least, a substantial compliance with the requirements of the statute. The plea here, as is usual in cases where the right of the plaintiff to recover anything on the claim he sues on, says that he (defendant) did not undertake or promise in manner and form as the plaintiff hath complained. In other words, the defendant by such a plea says that he did not undertake or promise to pay the claim sued on, and that, therefore, the plaintiff is not entitled to recover of the defendant such claim or any part thereof.

It has several times been said by this court that the purpose of the statute is to prevent delay to the plaintiff caused by continuances upon dilatory pleas when no real defense exists, and to require the defendant to make oath to his defense before his plea will be received.

Referring to the statute, in *Merriman v. Thomas*, 103 Va. 28, 48 S. E. 490, the opinion by Buchanan, J., while not discussing fully or deciding, because unnecessary, the question whether or not the affidavit must be in the prescribed form of the statute, makes the observation "that it is safer and better practice to conform, in substance at least, to the plain terms of the statute."

It would seem to be a mere quibble to say that, although the defendant by his plea and affidavit puts in issue the entire claim asserted against him by the plaintiff, the plea should be ignored or rejected because it was not, *ipsissimis verbis*, in the very form and language used in the statute.

Statutes of a like character and import were reviewed by the Court of Appeals of New York in *Spencer v. Myers*, 150 N. Y. 269, 44 N. E. 492, 55 Am. St. Rep. 675, 34 L. R. A. 175, and by the Supreme Court of Indiana in *Parvin v. Wimberg*, 130 Ind. 561, 30 N. E. 790, 30 Am. St. Rep. 254, 15 L. R. A. 775, and the view taken that a *substantial* compliance with the statute was all that is required.

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In the last named case Cooley on Con. Lim. is quoted as follows: "Those directions which are not of the essence of the thing to be done, but which are given with a view merely to the proper, orderly and prompt conduct of the business, and by a failure to obey which the rights of those interested will not be prejudiced, are not commonly to be regarded as mandatory, and if the act is performed but not in the time nor in the precise mode indicated, it will be sufficient if that which is done accomplishes the substantial purpose of the statute."

The title of the statute before us is: "When, in actions of *assumpsit*, no plea to be received in bar of plaintiff's claim unless defendant file with said plea an affidavit denying plaintiff's claim," etc. Can it be said that the affidavit here is not a denial of plaintiff's claim? Surely not.

The opinion by Keith, P., in *Lewis v. Hicks*, 96 Va. 91, 30 S. E. 466, referring to this statute, says: "Where the plaintiff files with the declaration in *assumpsit* an account verified by his affidavit, which is served upon the defendant along with the writ, the case goes to judgment in the office unless the defendant shall, during the term, file a plea in bar to the action verified by his affidavit," etc. The import of what was there said is that the case cannot go to judgment by reason of the default of the defendant if a plea in bar filed by him be verified by affidavit. The view stated by Keith, P., in that case is borne out by the late learned jurist, Judge Burks, in his address before the Virginia State Bar Association, when discussing the changes made in the law of pleading by the revision of 1887.

Conceding for the sake of the argument that the affidavit to the defendant's plea of *non-assumpsit* is not a sufficient compliance with the statute, might not the plaintiff have waived this irregularity or imperfection in the pleading, and has he not done so?

That the plaintiff could waive the requirement of the statute is clearly settled by the decisions of this court.

In *Lewis v. Hicks*, *supra*, it is said: "But this requirement of

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the statute was manifestly imposed for the benefit of the plaintiff and may be waived by him either expressly or by implication, or he may be by his conduct estopped to take advantage of it."

"Objections which do not go to the substance of an action are treated as waived if not made when the occasion for them arises. It is a well settled rule of practice that by appearing to the action the defendant waives all defects in the process and in the service thereof. The decisions go further and imply such waiver from the defendant's taking or consenting to a continuance as fully as they do from his pleading to the action." *New River Min. Co. v. Painter*, 100 Va. 507, 42 S. E. 300.

See also *Edison Gen'l Elec. L. Co. v. Johnstown Elec. L. Co.* (C. C.), 56 Fed. Rep. 456, where the court quotes with approval the following from Endlich, Affid. Defense, p. 493: "The right to ask for judgment for want of a sufficient affidavit of defense may, however, be waived by the plaintiff, or lost through his delay and misleading conduct. If, instead of asking for a rule upon the defendant, who has filed his affidavit, he apparently treats the latter as sufficient, and takes other steps in the case looking towards, and compelling the defendant to prepare for, its progress according to the common law forms, he cannot afterwards be permitted to turn back and attack the affidavit whose sufficiency he must, from his conduct, be regarded as having conceded."

The same reasoning applies where objections should be made to a pleading filed by a defendant when the occasion arises for the plaintiff to object, and certainly where, as in this case, he not only does not make objection to the pleading, but interposes no objection to a continuance of the cause to the next term of the court, and that, too, "with leave to defendant to file within 15 days his grounds of defense." The occasion for objection on the part of the plaintiff to the sufficiency of the plea or the affidavit annexed thereto arose not only when the plea and the affidavit were filed, but when the order at the September term,

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1908, of the court was entered, continuing the cause to the next term. The plaintiff either agreed to this order or accepted it without objection, for he was present certainly by counsel, as the order, which imports verity, reads: "This day came the parties, by their attorneys, and the plea of *non-assumpsit* having been filed on a former day of this term, on motion of the defendant he is given 15 days in which to file his grounds of defense, and this cause is continued."

If, as the plaintiff contends before this court, the defendant's plea in bar with the affidavit annexed thereto was not in fact filed, then clearly the objection should have been made when the order reciting that fact and continuing the case to the next term of the court was entered.

As said by Endlich in his work on Affi. Defense, *supra*, after stating how the right of a plaintiff to ask for a judgment for want of a sufficient affidavit may be lost through his delay or misleading (an authority peculiarly applicable to this case), when there has been delay or misleading conduct on the part of the plaintiff, "he cannot afterwards be permitted to turn back and attack the affidavit whose sufficiency he must, from his conduct, be regarded as having conceded."

The order of the September term, 1908, is, as said in the argument of this case here, informal, in that in its heading the plaintiff is stated to be "E. Griffith Dotson," omitting the word "receiver" following the name, but to this we attach no importance whatever.

Nor do the cases of *Spencer v. Fields*, 97 Va. 38, 33 S. E. 380, and *Price v. Marks*, 103 Va. 18, 48 S. E. 499, sustain the plaintiff's contentions, for the reason that in the first-named case it was merely held that where the plaintiff filed with his declaration containing the common counts in *assumpsit* his own affidavit, in compliance with the statute, the trial court could not receive pleas in bar offered by defendants without the affidavit thereto required by the statute, unless the affidavit had been waived by the plaintiff; and, in the second-named case the

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plaintiff, Price, filed with his declaration at rules the required affidavit, while the defendant failed to comply, either at rules or the next term of the court, with the terms of the statute, and thereby lost her right to make defense to the action.

We are of opinion that the judgment here complained of is erroneous, and it will, therefore, be reversed and annulled, and the cause remanded to the circuit court to be further proceeded with in accordance with the views herein expressed.

*Reversed.*

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Syllabus.

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**Staunton.****A. H. JACOBY COMPANY v. WILLIAMS.**

September 9, 1909.

1. **MASTER AND SERVANT—*Place of Danger—Voluntary Act of Servant.***  
A servant of mature years who volunteers to go to a particular place of danger on the occasion of his injury cannot complain that he was sent out of his regular employment into a place of danger.
2. **MASTER AND SERVANT—*Methods of Work—Presumption.***—In the absence of evidence to the contrary, it will be presumed that the methods of work adopted by a master are proper and sufficient.
3. **MASTER AND SERVANT—*Assumption of Risk—Notice of Dangers.***  
The rule which requires the master to inform his servant of the dangers ordinarily incident to the service, and if he fails to do so and the servant has no opportunity to learn them, the servant will not be held to have assumed the risks not obvious to one of his age, experience and judgment, only applies where there is a danger known, or which ought to be known, to the master, of which the servant, on account of his youth or inexperience, is ignorant, and which he cannot reasonably be expected to discover by the exercise of ordinary care.
4. **MASTER AND SERVANT—*Notice of Dangers—Obvious Dangers—Presumption.***—A master is under no obligation to warn an adult servant of sound mind of the existence of dangers that are visible to any man of ordinary intelligence, though not an expert, and which he could not fail to see and comprehend. The master has the right to assume, in the absence of evidence to the contrary, that such a servant has ordinary intelligence and capacity, and is possessed of the instinct of self-preservation.
5. **MASTER AND SERVANT—*Safe Place—Changing Conditions—Making Place Safe.***—The general rule that a master must use ordinary care to provide his servant a reasonably safe place in which to work does not apply to a place which is constantly changing by reason of the work being done, nor where the very work the servant is employed to do consists in making a dangerous place safe.

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6. MASTER AND SERVANT—*Happening of Accident—Presumption—Negligence.*—Negligence of the master resulting in injury to his servant cannot be inferred from the mere occurrence of an accident. The presumption is that the master has discharged all of his legal duties to his servant, and this presumption can only be overcome by affirmative proof. In order to hold a defendant liable for a negligent injury, there must be affirmative and preponderating proof of the defendant's negligence.
7. NEGLIGENCE—*Proximate Cause—Requisites.*—The requisites of proximate cause are the doing or omitting to do an act which a person of ordinary prudence could foresee might naturally and probably produce the injury by such act or omission, and the infliction of the injury by such act or omission.

Error to a judgment of the Circuit Court of Scott county in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

*Reversed.*

The opinion states the case.

*Joseph L. Kelly*, for the plaintiff in error.

*Coleman & Carter*, for the defendant in error.

CARDWELL, J., delivered the opinion of the court.

This action was brought by defendant in error to recover of plaintiff in error damages for injuries to the plaintiff alleged to have been caused by the negligence of the defendant.

At this, a second trial of the case (the jury failing to agree at the first trial), upon all the evidence offered being submitted to the jury, the defendant demurred thereto, in which demurrer the plaintiff joined; and the jury having assessed damages to the plaintiff in the sum of \$3,000, subject to the ruling of the court upon the demurrer to the evidence, the court overruled the demurrer and entered judgment in accordance with the verdict.

The following are the facts and circumstances attending the accident out of which the suit arose: Williams (defendant in

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error and plaintiff below), about 29 years of age, was engaged to work as a common laborer for plaintiff in error (defendant below) upon and about a certain railroad grade which defendant was constructing along the side of a steep and rocky hill which runs up some distance from Clinch river, and to construct this railroad bed or grade it was necessary to blast and tear down a portion of the cliff above it. The roadbed or grade at that point had been started for a single track, and had been carried through or along the side of the cliff for some distance when it was determined to widen the grade for a double track. The upper side or "slope" of the cut through the face of the hill had been blasted off and thrown down once, and another thickness at the time of the accident to Williams was being taken off along the upper side—i. e., more of the cliff had to be and was being torn down, and the method of doing this was to drill deep holes on the upper side of the cut, sinking these holes down from a point several feet back from the top of the slope. After the holes had been drilled they were first "sprung" by charges of dynamite placed and shot in the bottom, the purpose of which was to enlarge and open the hole so as to admit a heavy charge of powder with which to blow off the material between the hole and the face of the slope. These holes having been "sprung," the usual and perfectly natural effect was to shake, jar and "shiver" the side of the slope and to cause more or less rock, etc., to fall down. All such material, as well as what was blown off by the heavier shots, either rolled on down the hill towards the river or was lodged on the grade and thrown over on the lower side, or loaded in carts and hauled back on the "dump" or fill, which was a part of the grade extending back from the point at which the cut began; and the slope of the cut all along above the grade through the cliff presented a rough and dangerous appearance, a condition apparent to anyone with ordinary vision, as its discovery did not depend upon expert knowledge, or any experience or skill other than that which a man of ordinary intelligence would possess. According to Wil-



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liams' own statement, his duties were to "pick and shovel and carry steel and things like that," and he had also carried dynamite from the powderhouse to the cut where the "shooting" was being done. There is a variance in the evidence as to how long he had been at work at the point of this accident to him, but he admits that he had been working there six or seven days, and that he had a short time before worked, perhaps two weeks, in a borrow-pit for the Carolina Company, engaged in the construction of this same roadbed along this same hill, doing the same general class and character of work which the defendant, the A. H. Jacoby Company, was doing at the time of the accident, the latter company having taken up the work where the Carolina Company left off.

Williams was working with a gang of men engaged in and about the cut when the accident to him happened, the chief work being tearing down the face of the slope to widen the roadbed, and they were changing the condition of the slope to that end and for that purpose as fast as they could, and the dangers of the situation were all the time apparent.

Just preceding the accident some holes had been drilled up on top of the slope, Williams himself having been up there to carry steel with which to drill them. Upon returning to the cut below, he and others were engaged in loading carts, and while they were so engaged a signal was given from the top of the cut that one of the holes was to be "sprung"—i. e., a "shot" was to be let off. Immediately after the "shot" was let off Williams, with others, who had moved back up in the cut became engaged in loading a cart with rock that had been "shot" down from above. That the rocks all along the slope of the cut were "shivered" and looked dangerous after this "shot" cannot be doubted, although Williams undertook to say in his testimony that "he could not see it," but admitted that he did not know whether he looked and tried to see or not. In a few minutes one Hensley, who was the foreman (under the walking boss) of the immediate gang at work at this cut, and who had been up

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on top and near the holes that had been drilled, one at least of which had been "sprung," came down where Williams and others were at work and said that he needed some dynamite and other material (which, as affirmatively appears, was needed to break up some some big stone that had fallen or loosened from the "springing" of the hole in question), and called up one Monroe, a member of the gang, telling him to go to the commissary and powderhouse for it, and Monroe was "fixing to start" when Williams said, "I can go," or "I will go," or something to that effect, adding in substance that he was out of tobacco and wanted to get some; whereupon Hensley remarked that he did not care who went. Williams does not admit or deny the statement about the tobacco (which is not at all material), and there is no conflict as to the fact that Hensley first called on Monroe, and that Williams volunteered to go.

After Williams had volunteered to go, Hensley handed him a written order to the commissary clerk, designating the explosives, etc., which were wanted, and (according to a witness who was back on the dump or fill some distance away, and did not hear what Williams had said to Hensley) told Williams "to hurry, they were needing the dynamite right away." Williams having volunteered to go, in giving the instruction "to hurry," Hensley gave him no instructions as to the route he should travel, and Williams had in mind no other route than the one he started out on, although there were two other routes entirely safe that he might have taken, both of which he knew of, but had never used them, as he preferred the short way that he had been going on other trips to the commissary.

The path Williams took passed under the lower side of the grade where the men were at work and led right through the rock and waste that had from time to time been blasted and thrown down, or had rolled down from the cut and cliff or the roadbed above; the path being under the point at which the hole had been "sprung," and only about 25 or 30 feet below the railroad grade. The path was rough and steep, but was not

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itself dangerous; the danger being, as Williams unquestionably knew, or with his experience and intelligence should have known, not in the condition of the path, but in the results of the work carried on above it, and the condition of the slope from the grade or roadbed to the point above where the blasting had to be and was being done. When Williams had gone about 30 or 40 feet on this path, and was 25 or 30 feet below the grade of the railroad bed, at a point approximately opposite to the place where he had just been at work, a large rock that had been "shivered" (i. e., loosened by the "springing" of the hole, as mentioned), broke away from the slope of the cut and rolled down over the roadbed, burst, and a piece of it struck Williams and broke his leg, which subsequently had to be amputated.

The negligence of the defendant alleged is: (1) Unsafety of the place where the plaintiff was required to work; (2) non-inspection; (3) failure to warn as to the danger attending the work being done; and along with the alleged breach of these several duties the charge is repeated that the defendant sent the plaintiff out of his regular employment into dangers that were not incident thereto.

With respect to the charge that the plaintiff was sent out of his regular employment into danger, all that need be said is that he alleges in his declaration, and so testifies, that it was a part of his duty to make trips to the commissary for material; and aside from his having volunteered to go on the occasion of this accident to him, and having no legal cause of complaint (*Echels v. N. & W. Ry. Co.*, 96 Va. 69, 25 S. E. 545), he has failed, as we shall see, to prove actionable negligence on the part of the defendant.

The proof is absolutely conclusive that the rock, a piece of which struck Williams, was not broken or loosened up on top of the slope of the cut, but on the side thereof, and no witness states that the plaintiff could not from where he was see the place from which the rock actually fell, but several say that he could.

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Again, it is to be observed that whatever danger there was consisted, not in the condition of the path on which Williams was when injured, but in the work carried on above it, and the condition of the slope from the pathway to where the blast was made, due to the natural conditions existing there, and the changing and shifting conditions constantly arising in the prosecution of the work, and as to which Williams was as well informed as anyone else engaged in the work.

Whether the defendant's method of doing the work was the necessary and usual method is not raised by the pleadings nor dealt with in the evidence, and in the absence of evidence to the contrary it will be presumed that the methods of work adopted by a master are proper and sufficient. 26 Cyc. 1413; *Moore Lime Co. v. Johnson*, 103 Va. 88, 48 S. E. 577. There is no allegation of inexperience in the declaration, nor is inexperience proven. The plaintiff was of mature years—29 years old—and there was no attempt to show that he ever informed the defendant or its foreman, or that they knew, or ought to have known, of his inexperience, if such was a fact. He is to be presumed to be a man of ordinary intelligence, and have known that when the side of the slope under which he was engaged to work was shaken, jarred and “shivered” by blasts necessary to be made on the top of the slope, the materials thereby loosened were liable to fall down upon him and others below. *Robinson v. Dininny*, 96 Va. 43, 30 S. E. 442.

The rule that it is the master's duty to inform his servant of dangers ordinarily incident to the service, and if he fails to do so and the servant has no opportunity to learn of them, the servant will not be held to have assumed the risk not obvious to one of his age, experience and judgment, “only applies where there is a danger known, or which ought to be known, to the master, of which the servant, on account of his youth or inexperience, is ignorant, and which he cannot reasonably be expected to discover by the exercise of ordinary care.” *Richmond Locomotive Works v. Ford*, 94 Va. 640, 27 S. E. 509; *Partlett*

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v. *Dunn*, 102 Va. 464, 46 S. E. 467; *Bollington v. L. & N. R. Co.*, 125 Ky. 186, 100 S. W. 850, 8 L. R. A. (N. S.) 1045; *Carriack v. Merchants W. Co.*, 151 Mass. 152, 23 N. E. 829, 21 Am. St. Rep. 438, 6 L. R. A. 735; *Bailey on M. L.*, 112.

“In case of an adult servant of sound mind, the rule is understood to be that where the dangers of the employment are visible so that any man of ordinary intelligence, though not an expert, could not fail to see and comprehend them, an employer is under no legal obligation to warn the servant of their existence.” 4 *Thompson on Neg.*, sec. 4061. See also notes to sec. 394, 1 *Labatt on M. & S.*

In *Jones v. Mfg. & Inv. Co.*, 92 Me. 565, 32 Atl. 512, 69 Am. St. Rep. 539, the opinion says: “In *Stuart v. West End Street Ry. Co.*, 163 Mass. 391, 40 N. E. 180, a young man of twenty was set at work feeding hay into a hay cutter, though that was not his regular work. No warning or instruction was given him as to the danger. Held, that the danger was so obvious that he must be presumed to have understood it. The court said: ‘Where the elements of the danger are obvious to a person of average intelligence using due care, it would be unreasonable to require an employer to warn his employee to avoid dangers which ordinary prudence ought to make him avoid without warning. The mere fact that he cannot tell the exact degree of the danger, if the nature and character of it can easily be seen, is not enough to require warning and instruction to a man of full age and average intelligence. Something may properly be left to the instinct of self-preservation and to the exercise of the ordinary faculties which every man should use when his safety is known to be involved.’

“ ‘The master may assume that an adult person has ordinary intelligence and capacity, and unless he has notice to the contrary, he is under no obligation to instruct or warn such a servant as to dangers which the ordinary servant would understand and appreciate.’ 2 *Cooley on Torts* (3d edition), p. 1132.”

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Unquestionably where a servant is employed to engage in a dangerous work, such as excavation, quarrying and the like, the master, as a general rule, owes him the duty to use ordinary and reasonable care and diligence to make his place of work as reasonably safe as the nature of the work admits of, but this general rule does not apply to a place which is constantly changing by reason of the work done. 26 Cyc., p. 1117, *et seq.* See also *Finlayson v. Utica M. & M. Co.* (C. C. A.), 67 Fed. Rep. 510, where the rule is fully discussed, and it was held that the rule cannot be justly applied to cases in which the very work the servants are employed to do consists in making a dangerous place safe, or in constantly changing the character of the place for safety as the work progresses. "The duty of the master does not extend to keeping such a place safe at every moment of time as the work progresses. The servant assumes the ordinary risks and dangers of his employment that are known to him, and those that might be known to him by the exercise of ordinary care and foresight. . . ." See also *Heald, Receiver, v. Wallace*, 109 Tenn. 347, 21 S. W. 80; *Russell Creek C. Co. v. Wells*, 96 Va. 416, 31 S. E. 614; *N. & W. Ry. Co. v. Coffey*, 104 Va. 671, 51 S. E. 729, 52 S. E. 367; *Black v. Portland C. Co.*, 106 Va. 121, 55 S. E. 587.

In the last two mentioned cases relied on by the plaintiff in this, the recovery was sustained, but the doctrine laid down in the other authorities above cited was expressly recognized, and in the first named of these two cases it is emphasized that "the unsafe condition was not attributable to the work which was being conducted in the quarry"; and in the other, the opinion, after showing that the danger was not open or obvious or discoverable by the plaintiff, in the exercise of ordinary care for his own safety, says: "Nor can it be maintained that the dangerous condition of the place at which Black was put to work and where he met his death was due to the changing and shifting conditions of the quarry brought about in operating it."

This doctrine is reviewed in 2 Labatt, secs. 587 and 588,

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where, in conclusion, the learned author says: "It should be observed that in some cases of this class the element of the fellow servant's negligence is not involved at all, and recovery is denied on the broad ground that there is no breach of duty on the master's part."

To the contention that Hensley knew of the "perils" which Williams would encounter, and the "dangers incident to travelers along the dug-out way" he was traveling when injured, and that Williams was without experience, a complete answer is that the evidence not only does not show that Williams was inexperienced (in fact, it was not alleged), but conclusively shows that Williams was permitted to go at his own request, and that he as well knew, or ought to have known by the exercise of ordinary care, of any "perils" or "dangers incident" to the route he himself chose, as did Hensley, and, therefore, Williams on no legal ground could complain of the failure of Hensley to warn him of these "perils" and incidental dangers.

The alleged neglect to inspect seems to refer only to the pathway on which the plaintiff, Williams, was struck by the falling rock, and there is no evidence whatever tending to show that such an inspection would have disclosed the danger of rocks falling upon the pathway likely to injure persons passing thereon, or that inspection in such a case was usual or necessary.

In all cases of the class to which this belongs it is held that negligence on the part of the employer cannot be inferred from the mere occurrence of an accident by which his servant is injured; the presumption being that the master has discharged all of his legal duties to his servant, and this presumption can only be overcome by affirmative proof. *Moore L. Co. v. Johnson, supra*, and cases there cited; *Va. I. C. & C. Co. v. Kiser*, 105 Va. 705, 54 S. E. 889.

In this case the work was essentially dangerous, and the place was, therefore, not safe; but there is nothing to show that the place was less safe than the work in hand made unavoidable, and, besides the presumption that Williams was acquainted



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with the dangers of the work, his own testimony shows that he did, as a matter of fact, understand the method and the purpose and effect of "springing" the holes, and comprehended the danger caused thereby to persons working in the cut below, or had full opportunity to do so. He had before carried steel to the men who drilled the holes, and had on the day of his injury carried up on the slope the steel which he knew was to be used to drill and "spring" holes under which he was to work. In truth, his testimony disclosed that he was quite familiar with the entire method of doing the work; that when a blast was made, as on the day of his injury, rock was liable to fall, and had looked at the slope "lots of times to see if there was danger." There was everything in the situation to warn him of the dangers, and to inform him that the best point from which to observe the effect of the "springing" of the holes at the top of the slope was from below, where he was and where he usually worked; that one man could see this as well as another; and that no one, whatever were his duties in connection with the work being done, could tell certainly whether a particular rock or rocks were liable to fall upon the roadbed or the pathway below and injure someone, without climbing upon the face of the cliff and prizing at them, which would be attended with imminent danger to the one going on such a mission.

As already observed, all engaged at work in and about this cut along the side of a cliff knew and well understood, or could have known and so understood by the exercise of ordinary care for their own safety, the dangers attending the work, and that those dangers to a greater or less degree increased as the shifting conditions were brought about by the progress of the work; so that inspection was neither necessary nor usual, and would not, under the circumstances existing when Williams was injured, have afforded him any better protection against danger than the precautions that he could and should himself have taken.

"In order to hold a defendant liable for a negligent injury there must be affirmative and preponderating proof of the de-



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fendant's negligence." *Clinchfield Coal Co. v. Wheeler*, 108 Va. 448, 2 Va. App. 369, 62 S. E. 269; *So. Ry. Co. v. Moore*, 108 Va. 338, 64 S. E. 747, 2 Va. App. 325; *N. & W. Ry. Co. v. McDonald's Admr.*, 106 Va. 207, 55 S. E. 554, and *Same v. Witt*, *post*, p. 117, 65 S. E. 489.

The requisites of proximate cause are the doing or omitting to do an act which a person of ordinary prudence could foresee might naturally and probably produce the injury by such act or omission, and the infliction of the injury by such act or omission. *Wilson v. Southern Ry. Co.*, 108 Va. 822, 62 S. E. 972, 2 Va. App. 645.

Viewing the evidence in this case in the light of the established principles of law adverted to, we are of opinion that actionable negligence on the part of the defendant has not been established; therefore the judgment of the circuit court must be reversed, the demurrer to the evidence sustained, and judgment entered by this court for the plaintiff in error, the defendant below.

*Reversed.*

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**Staunton.**

## KIRK v. OAKLEY AND OTHERS.

September 9. 1909.

Absent, Keith, P.

1. JUDICIAL SALES—*Right of Purchaser Before Confirmation—Removal of Encumbrances—Parties.*—Although the doctrine of *caveat emptor* applies to judicial sales, nevertheless, a purchaser in good faith at such a sale is entitled to a marketable title, and will not be compelled to accept a defective title if objection on account of such defects be made before confirmation. If the objection be that there are encumbrances on the land, the encumbrancers should be brought before the court and their rights determined. They cannot be determined in the absence of the parties in interest.

Appeal from a decree of the Corporation Court of the city of Roanoke. A sale of real estate was made under a decree rendered in the suit of *Oakey, Exor.*, v. *Woolwine*, and at such sale W. V. Kirk became the purchaser. He refused to comply with the terms of sale on account of an alleged defect of title. From a decree compelling him to comply, Kirk appeals.

*Reversed.*

The opinion states the case.

*Shackleford & Gish* and *C. G. & M. H. Moomaw*, for the appellant.

*McClung & McClung* and *Robertson, Hall, Woods & Jackson*, for the appellees.

WHITTLE, J., delivered the opinion of the court.

The sole question involved in this appeal is the right of the appellant, W. V. Kirk, the purchaser of the lot in controversy

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at a judicial sale, before confirmation, to protect his title by having alleged holders of outstanding liens upon the property convened and their rights judicially ascertained and determined.

Kirk, having been advised of the defects in the title, declined to comply with the terms of sale; whereupon the court awarded a rule against him to show cause why the property should not be resold at his risk.

In answer to the rule he alleged that the title to the property was defective; being encumbered by sundry judgments against a former owner, and also by certain contingent dower rights therein, to which he called the attention of the court, and prayed that the alleged encumbrancers might be made parties and their rights adjudicated.

Though the principle is well settled that the doctrine of *caveat emptor* applies to judicial sales (*Stone v. Painter*, 5 Munf. 287; *Long v. Weller*, 29 Gratt. 347; *Bulin v. Melhorn*, 75 Va. 639; *Smith v. Wersham*, 82 Va. 937, 1 S. E. 331; *Sexton v. Patterson*, 1 Va. Dec. 551; *Flanary v. Kane*, 102 Va. 547, 46 S. E. 312, 681), nevertheless it is likewise true that a purchaser in good faith at such sale is entitled to a marketable title, and will be protected where objection is made to defects in the title before confirmation. *Threlkels v. Campbell*, 2 Gratt. 198, 44 Am. Dec. 384; *Young v. McClung*, 9 Gratt. 336; *Long v. Weller*, *supra*; *Thomas v. Davidson*, 76 Va. 338; *Boyce v. Strother*, 76 Va. 862; *Hickson v. Rucker*, 77 Va. 135.

The rule is thus stated in Rorer on Judicial Sales, secs. 155, 156: "But such purchaser at a judicial sale may not be thus compelled to complete the sale if the title be defective, nor to pay the consideration money until the defect, if there be one, is obviated; for although the rule *caveat emptor* applies after the sale is closed by payment of the purchase money and delivery of the deed, if there be no fraud, yet the buyer, if he discover the defect beforehand, will not be compelled to complete the sale.

"Sec. 156. And, therefore, if a rule be made against him with a view to enforcing compliance with his bid, he may, on appear-

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ance thereto, have an order of reference to inquire into and report the state of the title to the property, and if the title prove to be doubtful and incurably defective, he will not be coerced into completion of the purchase."

In 2 Bar. Chy. Pr. (2d ed.), p. 1189, it is said the purchaser has a right to have omitted parties brought in; and in note 4, p. 1190, that "he may before confirmation make objections to defects in the title and have them remedied, but such objections made afterwards come too late, except in cases of after-discovered mistake, fraud and the like." Citing *Watson v. Hoy*, 28 Gratt. 698; *Thomas v. Davidson*, 76 Va. 338; *Nutt v. Summers*, 78 Va. 170.

For an exhaustive discussion of the general subject see monographic note on Judicial Sales, at end of the case of *Walker v. Page*, Va. Rep. Ann. (21 Gratt.), bottom page 951.

It was a vain ceremony for the lower court to undertake to determine the question of encumbrances in the absence of the parties in interest. The decree had no binding effect, and the purchaser was denied the redress to which he was plainly entitled upon the facts developed under the well-settled practice in such case.

For these reasons the decree must be reversed and the case remanded for further proceedings in conformity to the views expressed in this opinion.

*Reversed.*

Syllabus.

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**Staunton.**

McKENNIE AND OTHERS v. CHARLOTTESVILLE AND ALBEMARLE RAILWAY COMPANY AND OTHERS.

September 9, 1909.

1. MUNICIPAL CORPORATIONS—*Power to Compromise Disputed Claims—Arbitration—Consideration.*—A municipal corporation has the right, as a necessary incident to its right to contract and to sue and be sued, to settle and adjust unascertained or disputed claims made against it, or made by it against others. It may also submit such claims to arbitration, and the award, when fairly made, is binding on the corporation. In either case the controversy over the claim furnishes all the consideration necessary.
2. ARBITRATION AND AWARD—*Award Outside Submission—Severance.* In an arbitration between a city and a street railway company as to the amount due by the latter for street paving, if the award goes beyond the submission and undertakes to exempt the railway company from all obligations under the city ordinances, or the charter, to repair the pavement on each side of its rails for a period of five years, this part of the award is bad, but is separable from the residue and should be stricken out.
3. MUNICIPAL CORPORATIONS—*Franchises—Release from Liability—Publication—Code, Sec. 1033-f, cl. 5.*—Under the provisions of section 1033-f, cl. 5 of the Code (1904) declaring that no amendment to a city ordinance granting a franchise shall be made which releases the grantee, or his assignee, from the performance of any duty required by the ordinance granting the franchise, unless notice thereof be given to the public by advertising the same for ten days in a newspaper published in the city, the council of the city have no right, without such advertisement, to enter into a contract with a street railway company upon which there is a continuing obligation to do street paving, to accept from it a designated sum of money "in full satisfaction and discharge of all obligation and liability of the company for street paving under its franchises."
4. ARBITRATION AND AWARD—*Grounds for Setting Aside Award.*—It is equally the rule of equity as of law that the reason for setting aside an award must appear on its face, or there must be misbehavior in the arbitrators, or some palpable mistake.

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Appeal from a decree of the Corporation Court of the city of Charlottesville. Decree for the complainants. Defendant appeals.

*Affirmed*

The opinion states the case.

*George E. Walker and C. W. Allen*, for the appellants.

*Harmon & Walsh and Moon & Fife*, for the appellee.

KEITH, P., delivered the opinion of the court.

A bill was filed by McKennie and others, citizens and taxpayers of the city of Charlottesville, against the city of Charlottesville and the Charlottesville and Albemarle Railway Company, which was taken for confessed as to the city, and to which the railway company filed its demurrer and answer. .

The material facts appearing in the record are as follows: As early as 1886 a franchise was granted to the Charlottesville and University Street Railway Company to operate a street railway over and upon the streets of Charlottesville. One of the conditions of the grant was that the space between the rails and for one foot on each side of the track should be kept in order by the railway company. In January, 1894, a right of way and franchise was granted to the Piedmont Construction and Improvement Company, upon the condition, among others, that the said company would build and continuously operate the line described, and that "the said company shall be required to keep in order the streets within their rails and for eighteen inches on the outside with the same materials as is used in the streets, or equal to that the city uses, with the consent of the council and under the direction of the street commissioner"; and that "at the intersection of each and every cross street that crosses their track said track shall be so ballasted and maintained that easy and safe crossing is assured to all vehicles."

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The Charlottesville and Albemarle Railway Company acquired the property and franchises of the two companies named above, is entitled to enjoy the rights conferred, and is charged with the burdens imposed by the franchises aforesaid.

By an act approved March 3, 1900, the council of the city of Charlottesville was given the power to negotiate loans for the purpose of improving and lighting its streets, buying necessary real estate, erecting public buildings, and supplying the city with sewerage. Under this statute an election was held, and a bond issue of \$80,000 was decided upon by the voters and taxpayers of the city to carry out these improvements. The city council appointed a committee, consisting of four members of the council and three citizens, whose duty it was to make all contracts for street improvement. The committee was required to employ a competent engineer to supervise said improvements, and to submit its acts to the council for ratification or rejection. This committee was known as the "Special Street Improvement Committee."

The engineers employed to supervise the work in February, 1903, reported to the committee that in their opinion the whole work of street improvement would cost the sum of \$77,000, but from this sum should be deducted the sum of about \$14,000, which would be due from the street car company for its portion of the work. The railway company denied that there was any liability upon it to do any part of the said work, or that the city had any claim on it by reason of, or growing out of, the said street improvement, representing that in 1896 it had paid its portion of the cost of macadamizing Main street, and had procured from the city a receipt in full for all claims for such work in the future.

Negotiations were then entered into between the street committee and the railway company, then known as the Charlottesville City and Suburban Railway Company, which resulted in a contract being entered into between the city and the company, which was agreed upon and formally executed on October 9,

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1903, and formally ratified by the council on October 10, 1903. By the terms of this contract it was agreed, among other things, that "When the work of paving Main street shall be completed in accordance with the plans and specifications of the city engineer, and as hereinbefore provided, the company will pay the city the sum of \$5,000.00, and the payment of the same will be in full satisfaction and discharge of all obligation and liability of the company for street paving under its franchise, but will not, of course, affect its obligation as to keeping in order the portion of the streets occupied by it as provided in said franchise."

Upon the completion of this work the street car company refused to pay the \$5,000 agreed upon, upon the ground that the work had not been done in accordance with the contract; and thereupon negotiations between the company and the city were set on foot, and on the 23d of March, 1905, the whole matter in controversy between the railway company and the city was submitted to arbitration.

The terms of submission were as follows:

"The city of Charlottesville and the Charlottesville and Albemarle Railway Company are at issue on the following questions:

"(1) What damage, if any, has resulted to the city of Charlottesville from the injury to its Main Street pavement adjacent to the rails of the said railway from the wheels of the cars.

"(2) What amount is due the city of Charlottesville for paving the track of said railway within the corporate limits of said city under contract of the 9th of October, 1903, taking into account such offsets and deductions, if any, as the railway company may be entitled to.

"The said city of Charlottesville and the said Charlottesville and Albemarle Railway Company desire to end all said controversies between them by referring all of their said differences, as set out above, or such of them as may exist on the 30th day of March, 1905, to arbitration.



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“Therefore, this agreement between the said city of Charlottesville of the first part, and the said The Charlottesville and Albemarle Railway Company of the second part:

“Witnesseth: That the matters in controversy between the said parties are hereby referred to the arbitrament and award of Judge John M. White and Col. T. M. R. Talcott, with liberty to said arbitrators, before they enter on the said arbitration, to choose an umpire, who shall decide any and all of the questions of difference between the parties hereto if said arbitrators fail to agree.

“Said arbitrators and their umpire shall meet in the council chamber in Charlottesville, at some time to be fixed by them, not later than the 10th day of May, 1903 [1905], and after hearing such evidence as the parties hereto may adduce, and making such examinations as they may wish, the said arbitrators or their umpire shall decide all of the matters in controversy between the parties hereto according to the legal rights of the parties as speedily as may be. Such final award not to be delayed beyond thirty days from said 10th of May, 1905.

“The award shall be made in writing, and as soon after being made as possible it shall be filed by the arbitrators with the clerk of the Corporation Court of Charlottesville, who shall thereupon and at once notify the said city of Charlottesville and the said Railway Company of the fact that said award has been filed in his office. Such notice to be served by the sergeant of the said city.

“On the first day of the next term of the Corporation Court of Charlottesville, immediately succeeding the date of such filing, said award shall be presented in court by the said clerk, and unless good cause, as set out in 4 Min. Inst. (3d Ed.) part 1, p. 185-188, be shown against it by one or both of the parties hereto, the same shall be entered up as the judgment of said court without further delay.

“But if good cause be shown against said award, which in the opinion of the said court demands any change in the same,

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then the said court shall make such change as to it may seem proper, and the award thus amended shall be entered as the judgment of the court.

“And the parties hereto agree and bind themselves to abide by the judgment of the court thus entered as final and conclusive, neither party to have the right of appeal therefrom.

“The costs of said arbitration, including the costs accruing after the filing of said award, and up to and including the final judgment of the court, shall be borne equally by the parties hereto.

“Witness the following signatures and seals this 23d day of March, 1905.”

It appears that the arbitrators designated William E. Cutshaw, of Richmond, as umpire, and that he signified his acceptance by his signature.

On the 3d of May, 1905, the arbitrators filed a paper as follows:

“The undersigned arbitrators and umpire having heard the evidence and statements of counsel in reference to the matters of controversy between the city of Charlottesville and the Albemarle Railway Company, submitted to them for their determination, and having considered the same, are of opinion and do decide and award that the said railway company pay to the said city of Charlottesville the sum of twenty-five hundred dollars, with interest from date till paid, in full satisfaction of all matters submitted to us—except that the said railway company is released from all obligations under the city ordinance or the charter to repair the pavement on each side of its rails for a period of five years.”

This award having been filed on May 3, 1905, the council met and determined to resist it, and authorized the employment of counsel, who filed a bill, not in the name of the city as plaintiff, but in that of three taxpayers of the city. The bill attacks the contract of October 9, 1903, upon two grounds: That it lacks

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valuable consideration; and that there was no advertisement as provided by section 1033-f of the Code of Virginia.

The Corporation Court, in its opinion, disposes of these two questions as follows: "A valuable consideration is defined by Story on Promissory Notes as consisting 'in some right, interest, profit or benefit accruing to the party who makes the contract, or some forbearance, detriment, loss, responsibility, or act, labor, or service on the other side.' At the time of this contract the street car company denied any liability to the city, and there was and still is a dispute as to how much of the track the ordinances required the company to pave. A new rail was agreed to be put down by the company at the cost of ten thousand dollars, and the location of the track was changed. All these matters were covered by the contract, and it seems to me furnished a valuable consideration for a valid adjustment and agreement.

"But a Virginia statute is cited to the effect that 'no amendment or extension of any such franchise, right or privilege that now exists, or that may hereafter be authorized, which extends or enlarges such franchise, right or privilege, either as to the time during which it is to last or as to the territory in which it is to be enjoyed, shall be granted by any city or town unless the provisions of this act shall have been complied with; and no amendment that releases the grantee, or his assignee, from the performance of any duty required by the ordinance granting the franchise, or that authorizes an increase in the charges to be made by such grantee or assignee, for the use by the public of the benefits of such franchise, shall be granted unless and until notice of such proposed amendment shall be given to the public by advertising the proposed amendment for ten days in some newspaper published in the city or town.' (Section 1033-f, cl. 5.)

"It is strenuously insisted that the contract of October 9, 1903, was invalid because of the lack of the ten day's advertisement required by the above law, that the contract released the street car company from the performance of a duty, to-wit: the

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payment of a larger amount than five thousand dollars (\$5,000), and that the lack of the advertisement was fatal.

'I have examined the contract carefully, and, except in one particular, I can find in it nothing more than an adjustment of many differences. The council surely had the right to ascertain the precise amount which was due by the street car company, to receive such amount, and to execute a valid receipt for it. This power was necessarily lodged somewhere. That it must have existed somewhere is shown by the fact that there are in the pleadings in this case three distinct and different statements of this amount, two of them by the plaintiffs. The city's claim is put at something over fourteen thousand dollars. It is again, by the same plaintiffs, put at twelve thousand four hundred and thirty-nine dollars. In another calculation, based on paving only one foot on each side of the rail, it is put at something over eight thousand dollars. The power to adjust these differences and settle them, validly and finally, must have been lodged somewhere, and that somewhere is, in my opinion, in the regularly constituted governing authorities of the city. . . . .

"I cannot see in this contract, except in one particular, anything more than an adjustment of money differences by parties mutually interested in such adjustment and empowered to make it. The city may have made a bad adjustment—that is not a subject of interest now—but in the opinion of the court it made an adjustment which it was empowered to make, except in one particular. The contract undertakes to make the payment of the five thousand dollars 'in full satisfaction and discharge of all obligation and liability of the company for street paving under its franchise.' This does come into conflict with the statute above referred to, if, as the court is inclined to think, the street paving is a continuing obligation. Defendant asks that this clause be stricken out of the contract if the court finds it necessary to do so in order to maintain the validity of the contract. The court does find it necessary, and this language

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should be expressly stricken out by the decree to be entered in this cause.

“The award of the arbitrators is also attacked in this case. By the terms of the submission, the corporation court was empowered to amend it. This power, in the judgment of the court, does not extend to a review of the whole controversy, but simply to an amendment in any particular in which the award may be illegal, ‘as set out in 4 Min .Inst. (3d Ed.), part 1, p. 185-186.’

“In my opinion that portion of the award which says, ‘except that the said railway company is released from all obligations under the city ordinance or the charter to repair the pavement on each side of its rails for a period of five years,’ is clearly illegal. It is outside of the submission, and, in addition, undertakes to repeal city ordinances, or rather to do away with duties required by them. The defendant opposed this view, but insisted that if this portion of the award is held to be bad, yet it is severable, and should be stricken out without prejudice to the plaintiffs or the city, leaving the residue of the award to stand. The court is of opinion that this portion of the award must be stricken out.”

And the decree appealed from was entered in accordance with this opinion.

That there was an honest difference between the city of Charlottesville and the railway company as to their respective rights, duties and liability, there can be no doubt; and authority is abundant, if authority for such a proposition were needed, that the city has a right to settle and adjust unascertained or disputed claims made against it, or made by it against others, as a necessary incident to its right to contract and to sue and be sued.

In *Prout v. Inhabitants of Pittsfield*, 154 Mass, 450, 28 N. E. 679, it was held, that although the claim against the city might not have been originally valid, yet it furnished a good consideration for the settlement.

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In 1 Dillon on Mun. Corp., sec. 477, it is said: "Growing out of its authority to create debts and to incur liabilities, a municipal corporation has power to settle disputed claims against it, and an agreement to pay these is not void for want of consideration. If it has obtained a contract which, by mistake or a change of circumstances, it deems to operate oppressively upon the other party, an agreement to make an additional compensation, or modify or annul it, is not invalid for want of consideration."

It was held in *Town of Petersburg v. Moppin*, 14 Ill. 193, 56 Am. Dec. 501, that the power to sue and be sued give to a corporation the right to settle or compromise claims.

In *Grimes v. Hamilton County*, 37 Iowa 153, the court said: "The power to prosecute suits on behalf of a corporation includes the power to settle the same. So, the power to defend suits brought against a corporation gives them the same power of adjustment. They may compromise doubtful controversies to which the corporation is a party, either as plaintiff or defendant. The law vests them with discretion in such matters, which they are to exercise for the best interests of the corporation. The settlement of an existing controversy, if made in good faith, binds the corporation, but if collusively made, it is not obligatory."

By section 3006 of the Code it is provided that "Persons desiring to end any controversy, whether there be a suit pending therefor or not, may submit the same to arbitration, and agree that such submission may be entered of record in any court. Upon proof of such agreement out of court, or by consent of the parties given in court, in person or by counsel, it shall be entered in the proceedings of such court, and thereupon a rule shall be made that the parties shall submit to the award which shall be made in pursuance of such agreement."

And by section 3009 it is provided that "No such award shall be set aside, except for errors apparent on its face, unless it appear to have been procured by corruption or other undue means,

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or that there was partiality or misbehavior in the arbitrators or umpires, or any of them. But this section shall not be construed to take away the power of courts of equity over awards."

It is equally the rule of equity as of law that the reason for setting aside an award must appear on its face, or there must be misbehavior in the arbitrators, or some palpable mistake. *Wheatley v. Martin's Admr.*, 6 Leigh 62.

From the institution of street-car service in the city of Charlottesville differences seem to have arisen between the city and the railways. These differences reached their climax when the city undertook a comprehensive system of street improvement and attempted to ascertain and determine the proportion of the cost of those improvements which was to be borne by the railway company. There can be no doubt that there was an honest difference of opinion between the parties, which constituted, as was shown by the opinion of the Corporation Court, a sufficient consideration for the contract entered into. There is no suggestion of bad faith or collusion between the parties. The award was made by able and upright arbitrators, and their conclusions have been scrutinized and corrected by a careful and upright judge. The authority of the city of Charlottesville to require the railway company to discharge all of the duties imposed by its franchise, or which, in the due exercise of its lawful power, it may hereafter see fit to impose, is in no respect compromised or diminished by the decree complained of, which we are of opinion should be affirmed.

*Affirmed.*

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**Staunton.****MODERN WOODMEN OF AMERICA v. LAWSON.**

September 9, 1909.

1. **INTOXICATING LIQUORS—*Wood Alcohol—Poison.***—Wood alcohol is a narcotic poison, and one who is killed by drinking wood alcohol by mistake for grain alcohol cannot be said to have died by the intemperate use of intoxicating liquors.
2. **INSURANCE—*False Statements in Application as to Health.***—A false statement made in an application for insurance concerning a mere temporary indisposition, not affecting the general health or constitution of the applicant, will not vitiate the policy, unless it be clearly proved that the statement was wilfully false, or fraudulently made, or was material. The fact that the answer was merely untrue is not sufficient, under the statute of this State, to vitiate the policy.
3. **INSURANCE—*Powers of Agent—Limitations of Policy.***—It is a matter of common knowledge that the business of insurance companies is necessarily transacted through agents, and they are presumed to know better than the public with whom they deal the requirements of their companies. Consequently, an applicant for insurance has a right to depend upon the superior knowledge of the agent, and, in the absence of notice of limitations upon his powers, to assume that his authority is commensurate with the nature of the employment, and in good faith to act upon the information imparted by the agent, and to follow his instructions in all matters pertaining to the preparation of the application.
4. **INSURANCE—*Benefit Societies—Application for Membership—False Statements Induced by Officers of Society—Estoppel.***—An applicant for membership in a mutual benefit society does not become a member until the delivery of the certificate of membership, and is not presumed to know the constitution and by-laws of the society, and if he is induced to join by false and misleading representations by the officers and agents of the society as to the purport and effect of certain questions in the application for membership, and in consequence thereof makes, or assents to, answers to such questions which both he and they know



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to be false, and he is accepted as a member and pays his dues, the society cannot, after loss, set up the falsity of the answers to such questions as a ground for avoiding liability on its certificate.

Error to a judgment of the Circuit Court of Wythe county in an action of *assumpsit*. Judgment for the plaintiff. Defendant assigns error.

*Affirmed.*

The opinion states the case.

*Freeman Plantz and Kime & Fox*, for the plaintiff in error.

*W. S. Poage and W. B. Kegley*, for the defendant in error.

WHITTLE, J., delivered the opinion of the court.

This action was brought by Lizzie B. Lawson, beneficiary, to recover of the defendant, the Modern Woodmen of America, a beneficial society, the amount of a certificate issued to her late husband, Malcolm D. Lawson, deceased.

There was a verdict and judgment for the plaintiff, which judgment is now the subject of review.

The salient facts are as follows: Late in June or early in July, 1907, J. W. Tinsley, as deputy head consul of the society, organized a local camp at Ivanhoe, in Wythe county, Virginia, with Joseph M. Warren, consul, McTeer Painter, banker, Samuel H. Dean, clerk, and Dr. J. S. Clark, camp physician. The falsity of the answers to the following interrogations in the application for membership is relied on to defeat the recovery:

(1) "Do you abstain entirely from the use of intoxicating liquors? A. Yes.

"How long have you been a total abstainer? A. Always.

"Were you ever intoxicated? A. No.

"Do you use intoxicating liquors daily? A. No."

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Without giving the applicant opportunity to respond to these questions, the deputy head consul wrote the foregoing answers, remarking to the applicant meanwhile, "I know you don't." "All of us take a drink; it don't mean you; it means a straight-out drunkard—stays drunk all the time." "All of us take a drink; a drink is not going to hurt anybody." These ejaculations were made while the deputy head consul was engaged in writing out the answers. In the special report of the camp physician it is said that the personal habits and physical and mental condition of the applicant render his prospects to attain full expectancy first class. At the time of these transactions it was known to the deputy head consul, to Warren, the consul of the local camp, to Dean, the clerk, and to Clark, the camp physician, that the answers were untrue, and that the applicant was a man of intemperate habits.

The following question and answer likewise appear in the application:

(2) "Have you, within the last seven years, been treated by or consulted any person, physician or physicians in regard to personal ailment? No."

With respect to this interrogatory and answer it was proved by Dr. Clark that some three months before Lawson's death he was passing the furnace, when Lawson came out from where he was working and complained of biliousness; that without dismounting from his horse he gave him a dose of calomel and supposed that after he recovered from the effects of the medicine he was all right.

Lawson paid his first dues and assessment, and his membership was approved and the certificate delivered August 1, 1907. On August 29, 1907, he died from wood alcohol poison, drunk by mistake for grain alcohol.

Two clear-cut general theories of the case are submitted. On behalf of the plaintiff it is alleged that the society, through its agent, the deputy head consul, had notice of Lawson's intemperate habits before he was admitted to membership in the so-

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ciety, and that the answers to questions contained in the application on that subject were untrue; that the society, with such notice, having received the applicant's first dues and assessment, and having adopted him as a member and delivered the certificate, will be held to have waived objections to the answers and be estopped to rely on their untruthfulness in avoidance of the certificate; that the statement that the applicant had not consulted a physician within the last seven years was not wilfully false and was not material; and, lastly, that the insured's death was caused by wood alcohol taken by mistake for grain alcohol, and not by the intemperate use of intoxicating liquors.

The defendant controverted all of the foregoing propositions, and insisted that the by-laws constituted part of the contract, and affected Lawson with notice of their contents; that he warranted the truth of the answers contained in the application, and that his answer that he had not consulted a physician within the past seven years was material and untrue; moreover, that his answers touching his use of intoxicating liquors were not only material but wilfully false; that according to the provisions of the certificate and by-laws the truth of these several answers is made a condition precedent to a recovery upon the certificate; besides, that the right of recovery was barred by the fact that Lawson's death was due to the intemperate use of intoxicating liquors.

The trial court adopted the plaintiff's theory of the case, and, overruling the specific objections of the defendant, admitted evidence and instructed the jury accordingly, rejecting opposing instructions in support of the defendant's hypothesis.

As matter of fact the evidence leaves no room for doubt that Lawson's death resulted from accidental poisoning. He mistook wood alcohol for grain alcohol, and imbibed the former with fatal result. Wood alcohol is definitely classed by the authorities as a narcotic poison, and not as an intoxicating liquor.

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Thus in *Faber v. Green*, 72 Vt. 117, 47 Atl. 391, speaking of methyl or wood alcohol, the court says: "Such alcohol is obtained by the destructive distillation of wood, is ranked as a narcotic poison, and if drank either pure or adulterated, or reduced many times its weight in water, other alcohol or fluid, it kills the person drinking it. It was not intended to be used as a beverage, and could not be so used. The laws against the illegal traffic in intoxicating liquors were intended to include only such liquors as could be used as a beverage (*Russell v. Sloan*, 33 Vt. 656), and to construe the statute as prohibiting the sale of other liquors similar in name, but so much more poisonous in nature as to prevent their being used in that way, would be giving it an extraneous and unnatural force not intended. Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate a legislative intention, and, if possible, so as to avoid an unjust or absurd conclusion." *Lau Ow Bew v. U. S.*, 144 U. S. 47, 36 L. Ed. 340, 12 Sup. Ct. 517.

There was plainly no evidence justifying an instruction founded on the theory that Lawson's death was occasioned by the intemperate use of intoxicating liquor, either directly or indirectly.

The next assignment that we shall consider is based upon the court's refusal to instruct the jury, as matter of law, that if Lawson was asked whether within the last seven years he had been treated by or consulted a physician in regard to personal ailment, and answered it in the negative, and that such answer was untrue or wilfully false, then they must find for the defendant. In lieu thereof, the court told the jury that if they should believe from the evidence that Lawson had within the last seven years preceding his application been treated by or consulted a physician in regard to a personal ailment, they must find for the defendant, if they believed that such statement was material or wilfully or fraudulently made.

We find no error in the ruling of the court on these instruc-

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tions. Indeed, the instruction given by the court followed literally the language of the Virginia statute, which declares that "no answer to interrogatories made by an applicant for a policy of insurance shall bar the right to recover upon any policy issued upon such application by reason of any warranty in said application or policy contained, unless it be clearly proved that such answer was wilfully false or fraudulently made, or that it was material." Pollard's Code, Biennial, 1908, sec. 28, p. 483; *Life Ins. Co. of Va. v. Hairston*, 108 Va. 832, 834, 851, 62 S. E. 1057.

In *Pudritzky v. Knights of Honor*, 76 Mich. 428, 43 N. W. 373, it was held that "a mere temporary ailment or indisposition which does not tend to weaken or undermine the constitution at the time of taking membership does not render a policy or certificate of insurance void."

The remaining and principal consideration which claims our attention arises upon the contention of the society that the certificate is null and void under the terms of the instrument itself, and the by-laws, by reason of the false answers in the application touching the applicant's habits with respect to intoxicants. But the circuit court instructed the jury in accordance with the countervailing views of the plaintiff.

As we have seen, the answers relied on to forfeit the certificate were, in point of fact, not the answers of the applicant, but of the agent of the society while engaged under authority of the by-laws in organizing a new camp, and with full knowledge that they were untrue. We have furthermore seen that at the date of the application and payment of the first dues and assessment the officers of the local camp all knew that Lawson was addicted to the intemperate use of intoxicants.

It is matter of common knowledge that the business of insurance companies is necessarily transacted through agents, and they are presumed to know better than the public with whom they deal the requirements of their companies. Consequently, an applicant for insurance has a right to depend upon the su-

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perior knowledge of the agent, and, in the absence of notice of limitations upon his powers, to assume that his authority is commensurate with the nature of the employment, and in good faith to act upon information imparted by the agent, and to follow his instructions in all matters pertaining to the preparation of the application. It would be, indeed, a mischievous doctrine to allow a beneficial society, whose officers and agents had induced a member to join by false and misleading representations as to the purport and effect of certain questions in the application for membership, after loss to make such misconduct the ground of forfeiture.

In *Planters Ins. Co. v. Myers*, 55 Miss. 479, 30 Am. Rep. 521, it is said that "the applicant may with safety rely upon the interpretations put upon the questions in the application by the company's agent."

In *Modern Woodmen of America v. Breckenridge*, 75 Kan. 373, 89 Pac. 661, 10 L. R. A. (N. S.) 136, 12 Am. & Eng. Ann. Cas. 636, it was held that a subordinate lodge of that order, with knowledge that a member had forfeited his certificate by the intemperate use of intoxicants, waives the right of the society to insist upon the forfeiture by continuing to receive his dues. Citing *High Court v. Schweitzer*, 171 Ill. 325, 49 N. E. 506, and *Modern Woodmen of Am. v. Lane*, 62 Neb. 89, 86 N. W. 943, where the court held: "The recognition of the continued validity of a certificate or policy, with knowledge of facts entailing a forfeiture, is a waiver of the forfeiture as a matter of law."

The cases of *Modern Woodmen of Am. v. Colman*, 68 Neb. 660, 94 N. W. 814, 96 N. W. 154; *Hoffman v. Supreme Council*, etc. (C. C.), 35 Fed. 255; and *McDonald v. Supreme Council*, etc., 78 Cal. 49, 20 Pac. 41, are cited to the same effect.

In the principal case the court said of the contention, that under the by-laws no local camp nor any of its officials shall have power to waive any of the provisions of the by-laws: "This has reference only to contractual waivers, and has no application

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to a waiver by operation of law resulting from the subsequent acts of the camp.”

So also on that point, in *McCarthy v. Piedmont Ins. Co.*, 81 S. C. 152, 62 S. E. 1, 18 L. R. A. (N. S.) 729, the court says: “Certainly until the delivery of the policy the applicant is not a member of the mutual association, and cannot be presumed to even know the constitution and by-laws of the association, much less to be bound thereby; and experience teaches that he acquires very little knowledge of the constitution and the by-laws after membership.” And in conclusion (in the principal case) the court observes: “Forfeitures are not favored in law, and certainly a semi-benevolent association, such as defendant claims to be, should not be encouraged to rely upon a forfeiture, and the court is justified in laying its hand upon any act of the association showing an intention to waive a forfeiture.” This case is sustained by numerous authorities cited in the note.

Thus, at page 640, many cases are collected for the proposition that “When a benefit society, with knowledge of the falsity of statements in an application for insurance with respect to the health or habits of insured, has demanded and received assessments, the society will be deemed to have waived the forfeiture for such misrepresentations.” Among the citations is *Modern Woodmen of America v. Hicks*, 109 Ill. App. 27.

At the same page the annotator gives the following citation: “It is only where an agent is acting for his principal and within the scope of his authority that notice to the agent of matters that would affect his principal is binding upon the latter. Consequently, a benefit society is not estopped to insist upon the forfeiture of a benefit certificate because of false statements in the application with reference to the use of intoxicants by the applicant, merely for the reason that the physician who conducted the medical examination subsequently and while not employed by or discharging any duty for the society acquired knowledge of the falsity of statements in the application. *Wigham v. Supreme*, etc. (Oregon, 1908), 94 Pac. 968.”

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As we have seen in the instant case, however, the deputy head consul was acting within the scope of his authority in organizing the camp and taking the application; the camp physician was acting as agent of the company in making the special report; the clerk received the dues for the month of August; and all of these officials, while so acting in the line of their respective duties, had personal knowledge of the falsity of the statements in the application as to Lawson's habits in the use of intoxicating liquors.

In such case the converse of the rule laid down in the Oregon case is true, and the knowledge of these agents affects their principal with notice. Accordingly, it has been held: "Where, however, a medical examiner, acting as agent for an order, assumes to write out the answers to questions in an application for insurance upon his own knowledge of the facts rather than from the answers given by the applicant, the order is not in position to claim that the answers are untrue." Citing, among other cases, *Sholliff v. Modern Woodmen of Am.* 100 Mo. App. 138, 73 S. W. 326.

In that case it was said: "The by-law of the beneficiary association that 'no officer of this society, nor any local camp or officer thereof, is authorized or permitted to waive any of the provisions of these laws, or of any other laws of this society which relate to the substance of the contract for the payment of benefits between the member and the society,' has been held to have reference to a completed contract of insurance and not to be a limitation upon the powers of the agent of the association in preparing and accepting applications for insurance," and that "there is a waiver of objection to the answer of an applicant for insurance in a beneficiary association to the question as to insanity in his family when, on stating the facts, the examining physician who wrote the answer, and who is an officer of the association, advised him to answer, 'No,' which answer was written in the application."



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In 29 Cyc. 189, 190, after discussing the power of a subordinate lodge, or its officers or agents, to bind the society within the scope of their authority, it is said: "If false answers by an applicant for membership are induced by an agent of the society, or the agent assumes to answer the questions from his own personal knowledge and answers falsely, the society is estopped to assert the falsity as a ground for avoiding liability. And if the applicant omits to disclose material facts, on the agent's representation that they are immaterial, the society is likewise estopped."

A full discussion of the doctrine of waiver and estoppel, as applicable to policies of insurance, with collection of authorities, will be found in notes to *Haapa v. Met. L. Ins. Co.* (Mich), 16 L. R. A. (N. S.), 1165 *et seq.*

Without noticing the assignments of error in greater detail, we are of opinion that the case was correctly submitted to the jury on the law, and that their finding is sustained by the evidence.

*Affirmed.*

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Statement.

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**Staunton.**

MORISON AND OTHERS v. AMERICAN ASSOCIATION, INC.

September 9, 1909.

Absent, Buchanan, J.

1. **MINES AND MINERALS—Cloud on Title—Iron Ore in Place—Possession—Removal—Irreparable Injury—Removal.**—The rule requiring the fee-simple owner of real estate to be in possession thereof in order to file a bill to remove a cloud on his title, has no application to the owner of iron ore beneath the surface of the ground. Such ore is not susceptible of actual possession, and the fee-simple owner may file a bill to enjoin the removal thereof, and incidentally to remove a cloud on the title. The removal of the ore is destructive of the very essence of the estate, and the resulting injury is irreparable, and in such case an injunction will be granted, notwithstanding a dispute, or even pending litigation as to the title.
2. **EQUITY JURISDICTION—Complete Justice.**—A court of equity, having properly taken jurisdiction to prevent the mining and removal of iron ore beneath the surface, may go on and do complete justice between the parties, although in doing so it has to settle the title to the ore which is in dispute.
3. **ADVERSE POSSESSION—Severance of Surface and Underlying Minerals.**—The title to the surface of land and to the underlying minerals may be vested in different persons, but after severance the title to neither can be acquired by adverse possession of the other.

Appeal from a decree of the Circuit Court of Lee county.  
Decree for the complainant. Defendants appeal.

*Affirmed.*

The opinion states the case.

*Orr & Noell, J. H. S. Morison and Duncan & Cridlin, for the appellants.*

*B. H. Sewell and Irvine & Morison, for the appellee.*

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HARRISON, J., delivered the opinion of the court.

The object of this suit, which was brought by the appellee, was to enjoin the appellants from mining, removing and disposing of iron ore from a certain tract of land, and to quiet the title to such ore and the mining rights attaching thereto.

The appellants deny that appellee was, at the time of the institution of this suit, or at any other time, the owner of the land in controversy or any part thereof, or that it was at any time in possession of the iron ore underlying the same or any part thereof. Appellants assert title in themselves to the land in question and to the iron ore in, on and under the same, and insist that they and those under whom they claim have enjoyed the open, notorious, continuous and exclusive possession of both the land and ore for more than thirty years.

The record clearly shows that the appellants are the owners of the surface of the land in question, and that the appellee is the owner of the minerals underlying the land, each deriving title from Robert Crockett, who conveyed the iron ore and mining privileges to the predecessor in title of the appellee in November, 1857, which was before the appellants or those under whom they claim had acquired title to the surface.

The contention of appellants that the deed of November 25, 1857, from Robert Crockett to Reuben Rose, the predecessor in title of appellee, did not convey a fee simple title to the iron ore, but only passed a license or right to mine and use the ore at a particular furnace, cannot be sustained. The conveyance in question contains all of the necessary elements of a valid deed—competent parties, a lawful subject matter, a valuable consideration, apt words of conveyance, and proper execution. The deed does not limit the estate granted. It sells, without reserve, all the iron ore in question to Reuben Rose, his heirs and assigns forever. There is no suggestion in the deed that the title should revert to the grantor, or his heirs, at any time or under any circumstances. The language of the deed plainly shows

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that its clear intent was to convey a fee simple title, and to provide that the mining privileges should continue so long as any iron remained under the surface of the land.

The only estate in controversy here is the iron ore. In addition to its being otherwise shown, appellants admit that at the time of the institution of this suit they were mining, removing and disposing of the iron ore. The first contention on behalf of the appellants is that actual possession of the iron ore by appellee at the time of the institution of this suit was necessary to give the circuit court jurisdiction to entertain the suit for any purpose. In support of this proposition is cited that line of decisions which hold that the right to invoke the equitable jurisdiction of courts to remove clouds from the title to real estate only accrues where the holder of the legal title to the land is in possession.

The case at bar presents wholly different considerations, and is not ruled by the cases relied on. Iron ore that is under the surface is not susceptible of actual possession. To have actual possession of iron ore it must be mined. When the appellants began to mine and remove the iron ore of the plaintiff, they were destroying the very substance of the estate, and the injury thus done was irreparable. In such cases a court of equity will interpose by injunction and prevent the wrong. *Manchester Cotton Mills v. Town of Manchester*, 25 Gratt, 825; *Miller v. Wills*, 95 Va. 339, 28 S. E. 337; *Bettman v. Harness*, 42 W. Va. 433, 26 S. E. 271, 36 L. R. A. 566; 4 Pom. Eq. (3d ed.), sec. 1351, p. 2692; Spelling on Extraordinary Relief, sec. 367.

The last cited author says: "The prevailing view and practice of the present day may be thus stated: 'When the bill states facts which show that a threatened trespass, if not prevented, will result in irreparable damage, or is in character and tendency destructive to the inheritance or to that which gives its chief value, an injunction will be granted, notwithstanding a dispute, or even pending litigation as to title.' "

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The court having properly taken jurisdiction to prevent the destruction of appellee's estate, it had the right to go on and do complete justice, although in doing so it had to settle the title to the iron ore which was in dispute. *Miller v. Wills, supra; Dunn v. Stowers*, 104 Va. 290, 51 S. E. 366.

The contention of appellants, that their plea of the statute of limitations is a bar to the right of appellee to recover the iron ore, is not well taken. The deed dated November 25, 1857, from Robert Crockett and wife to Reuben Rose was a severance of the estates in the land, creating a separate and distinct estate in Reuben Rose to the iron ore. It is well settled that one may own the surface and another the minerals in the same parcel of land. Title to the freehold of either cannot be acquired by adverse possession of the other. *Virginia Coal & Iron Co. v. Kelly*, 93 Va. 336, 24 S. E. 1020.

There is no error in the decree complained of and it is affirmed.

*Affirmed.*

Syllabus.

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**Staunton.**

NORFOLK & WESTERN RAILWAY CO. v. BOARD OF SUPERVISORS OF CARROLL COUNTY.

September 9, 1909.

1. COUNTIES—*County Roads—Board of Supervisors—Right to Sue.*  
The boards of supervisors of the several counties have the control, supervision, management and jurisdiction over all of the county roads, and are, in this respect, the successors of the former county courts. The board of supervisors of a county may maintain a suit to compel a railroad company to construct a county road which it had contracted with the county court to construct in lieu of a public road taken and occupied by it.
2. HIGHWAYS—*County Roads—Right to Alter—Railroads.*—Under the provisions of section 1094 of the Code of 1887, a railroad company can only alter a public road, or occupy it for its purposes, "whenever it shall have made an equally convenient road in lieu thereof," and its promise to make such new road is only an undertaking to do what the law required it to do before it could take the public road for its purposes. A promise to perform a legal duty does not make it any less a duty, nor does it transform the legal duty into a mere personal obligation.
3. SPECIFIC PERFORMANCE—*Restoring Highway—Railroads.*—A court of equity will compel a railroad company to perform its plain statutory duty of restoring a highway which it has invaded to its former state of usefulness, as a condition to using it for the purposes of its roadbed. A railroad company cannot invade a highway with its track without complying with the law which grants the privilege to do so.
4. HIGHWAYS—*Public Rights—Statute of Limitations—Laches.*—Public highways belong to the State, and the statute of limitations does not run against the rights of the public therein, nor does the doctrine of *laches* apply. As against the government, *laches* cannot be set up as a defense in equity any more than the bar of the statute can at law. Time does not run against the State, nor bar the rights of the public.
5. HIGHWAYS—*Acceptance—Enforced Use—Railroads—Change of County Road.*—Where a railroad company has been permitted to

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use a public road for its roadbed upon condition that it construct a new road equally as convenient as the old road, the fact that the public used the new road and that the county authorities, from time to time, worked and repaired it, cannot be construed as an acceptance of the new road in the face of an unequivocal refusal of record by the county court to approve and accept the road as a proper discharge by the railroad company of its obligations. The enforced use of the new road, for which the railroad company is responsible, cannot be invoked as an evidence of its acceptance.

6. RAILROADS—*Use of Public Highway—New Road—Duty to Construct—Liability of Purchaser of Property Franchises.*—The duty of building a new public road in lieu of a public road taken by a railroad company for its purposes rests upon the railroad company, and, if not performed by it, the responsibility passes, under the statute of this State, to its successor who has purchased its property and franchises, and is bound to perform "all such duties as could have been required of the first company."
7. SPECIFIC PERFORMANCE—*Contract to Build County Road—Railroads.* Where a railroad company has taken possession of and used for its purposes a county road, and has undertaken to build another equally as good and according to certain specifications, a court of equity will compel the performance of its contract.

Appeal from a decree of the Circuit Court of Carroll county.  
Decree for complainants. Defendant appeals.

*Affirmed.*

The opinion states the case.

*Phlegar & Powell, D. W. Bolen and Theodore W. Reath, for the appellant.*

*W. D. Tompkins and Wm. M. Foster, for the appellee.*

HARRISON, J., delivered the opinion of the court.

The bill in this case was filed by the board of supervisors of Carroll county for the purpose of compelling the Norfolk and Western Railway Company to perform its alleged obligation to construct a public road up New river from the Wythe county

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line to Wilkinson's Forge, in Carroll county, in lieu of a public road upon which the predecessor in title of the defendant company had constructed its railroad. The prayer of the bill was that the defendant railway company be compelled to build the public road, between the points mentioned, in accordance with certain specifications agreed upon by its predecessor with the county court of Carroll county, and in every respect as suitable and useful for the public as the old road which the railroad company had appropriated to its uses; or in the alternative to require the defendant company to restore to the county of Carroll the old highway in the condition in which it was when appropriated by the defendant.

From a decree of the circuit court, requiring the defendant railway company to build the new public road, this appeal has been taken.

The record shows that a public road ran through the county of Carroll, along the northwestern bank of New river, to the Grayson county line, which was much used as a highway by the people of that section. For a considerable part of the way from the Wythe county line to Wilkinson's Forge, a distance of three and one-half miles, a high mountain lay along the northwest side of the road, there being practically no level ground between the river and the mountain, except that occupied by the public road. When the New River Plateau Railway Company projected its line through this mountain region, it naturally desired, for economy, to occupy the level ground along the bank of New river, and finding the narrow space at the point mentioned already occupied as a public highway, it applied to the county court of Carroll county, at its October term, 1889, for viewers to be appointed to report to the court upon the advisability of discontinuing the county road from the Wythe line to Wilkinson's Forge. In response to this application the court appointed viewers with instructions to report in writing whether, in their opinion, the road should be discontinued, and what inconvenience would result therefrom; and also to report



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whether it would be advisable to discontinue the road provided the applicant would make in its place another suitable and lawful road for the public to travel. In compliance with this order, the viewers performed their work and unanimously concluded and reported that it would be inadvisable and improper to discontinue the road, because it was an important thoroughfare for the traveling public between the counties of Wythe and Carroll, and a very convenient passway generally. These viewers further reported that the railroad authorities, who were present, upon being informed of the conclusion, asked that they report and recommend to the court a temporary discontinuance of the public road, upon the terms that the railroad company make an entirely new and lawful county road between the points mentioned, along the mountain side above the railroad, so as to be entirely out of its way, and where necessary to place proper guards on the lower side so as to make it safe for the passage of wagons or anything else that may pass along the road. In response to this request, the viewers reported the proposition to be reasonable and recommended that it be granted by the court.

When this report was filed, the court, on the motion of the Norfolk and Western Railroad Company, the party interested, entered an order providing that the public highway should be discontinued when the Norfolk and Western Railroad Company had constructed the new road as proposed, in accordance with the terms and specifications of the report of the viewers, and had procured the right of way for such new road and turned the same over to the county. And on further motion of the railroad company, leave was given it to close the highway till the 15th day of February, 1890, so that the proposed work could be prosecuted at once, and the viewers were directed to report at the February term, 1890, whether the railroad company had constructed the new road and made it as good as the road or highway along the river.

On December 20, 1889, the viewers were directed to go over the proposed location of the new county road and report thereon.

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Those viewers suggested certain changes, and reported the route of the new road and filed a map showing its location, recommending that the road should not be less than seventy feet from the railroad, nor at a higher grade than five degrees. This report was ordered to be filed, and thereafter proper proceedings were taken by the railroad company to condemn or otherwise acquire the location for the road which it proposed to substitute for the old road.

In May, 1891, on motion of the Norfolk and Western Railroad Company, the court appointed five commissioners to meet and examine the new road made by the company in place of the old county road taken by the company, and report whether, in their opinion, the same should be received by the court. In June, 1891, this board of commissioners reported that they had carefully inspected and examined the road, and that the railroad company had only attempted to make a road; that it was no road at all, as contemplated by law; that it was not of necessary width, not smoothed of rocks and obstructions, well drained or otherwise in good legal order. They further reported that the road was on the mountain side where it was very steep and rocky; that in building the road it was necessary to prop it up or underpin it on the lower side to keep it on a level grade—the object being to prevent the road from sliding off and giving way on the lower side; that the timber used for the purpose was too small, unsafe and wholly insecure for the purpose and had given way, causing slides in the road; and that, in their opinion, at no distant day the whole road would slide into the railroad track below. In conclusion, the commissioners said that the road should not be received by the court and put upon the county to keep up. On the 15th day of June, 1891, this report was received by the court, approved and ordered to be filed, and the commissioners discharged.

On July 21, 1891, the Norfolk and Western Railroad Company again applied to the county court of Carroll county for the appointment of other commissioners to make a report on the new

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road that had been built. This commission was appointed, and reported in favor of receiving the new road, saying that it was as good as could be built upon the location by a reasonable expenditure of money. The county excepted to this report, and objected to the acceptance of the road; and thereupon the matter was continued until the September term.

No further action was taken on this report until January, 1892, when the following order was entered: "This day came the parties again by their attorneys, and by their consent and agreement it is ordered that the Lobdell Car Wheel Company and Carroll county withdraw their contest to the confirmation of the report made by Martin Hanks and others, and this matter is to be considered as if said report had never been filed. That the Norfolk and Western Railroad Company pay the cost, except that no attorney's fee is to be taxed in behalf of the contestants, and execution is stayed for sixty days."

This order shows that the report of Martin Hanks and others, recommending that the new county road be received, was not confirmed, but that the report was withdrawn and the matter allowed to stand upon the report of June, 1891, recommending that the road be not received, which report was approved and confirmed by the order of June 15, 1891.

It is suggested in argument, by counsel for appellant, that in the language "as if said report had never been filed," occurring in this order, the word "report" was inadvertently used, and that the word "exceptions" should be substituted in the place of "report."

The order suggests the idea that some adjustment of the contest over the report had been reached by the parties, but the record furnishes no warrant for the proposed change in the language of the order. If, however, the word "exceptions" was substituted for the word "report," the fact would remain that the court had not accepted or approved the new road as built by the railroad company. So far as the record shows it appears that the new road was never accepted by the court, nor by agreement of

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parties. No further action in the matter appears to have been taken until the institution of this suit, and the Norfolk and Western Railway Company have in the meantime, and for sixteen years or more, been continuously running trains upon its road built upon the bed of the old county road.

The action of the circuit court in overruling the demurrer to the bill is assigned as error.

The first ground assigned in support of the demurrer is that the board of supervisors had no right to maintain this suit. This contention cannot be sustained.

"The supervisors of the several districts in each county shall constitute the board of supervisors for said county, and by the name of 'The Board of Supervisors of . . . . . County' may sue and be sued in relation to all matters connected with their duties as such board, and have a seal and alter the same at pleasure." Va. Code, sec. 825.

"The board of supervisors of their respective counties shall have the control, supervision, management and jurisdiction over all of the county roads, causeways and bridges, landings and wharves erected or repaired within this State." Va. Code, 1904, sec. 944-a (1).

In this respect the supervisors are the successors of the county court, and the sections of the Code cited make their right to maintain this suit clear.

The only remaining ground relied on in support of the demurrer to the bill is that long acquiescence had barred the right of the board of supervisors to a specific performance of the alleged contract to build the new road, or the right to have abated as a nuisance the defendant company's occupancy of the old county road.

Section 1094 of the Code of 1887, which was in force at the time the defendant company took possession of the public highway in question, provides that, under certain circumstances and subject to certain conditions, a railroad may cross or alter a public road, but that such county road may be altered by any such

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railroad company only whenever it shall have made an equally convenient road in lieu thereof. This is a positive statutory requirement, that when the defendant undertook to change this public road, in order that it might occupy the old road for its own uses, it should provide an equally convenient road in lieu thereof.

The proceedings in the county court did not take the matter from under the operation of this statute. When the railroad company made its proposition to build an equally convenient road, if permitted by the court to occupy the old road, it did no more than the law required it to do before it could take for its purposes the public road. And when the court, in its order accepting the proposition, set forth the plans and specifications to be observed in building the new road, it was merely prescribing what would be regarded by it as a compliance with the statutory requirement to build an equally convenient road.

A promise to perform a legal duty does not make it any the less a duty, nor does it transform the legal duty into a mere personal obligation.

In the case of *City of Oskosh v. Railway Company*, 74 Wis. 534, 43 N. W. 489, 17 Am. St. Rep. 175, citing with approval *Jamestown v. Railway Co.*, 69 Wis. 648, 34 N. W. 728, it is said: "In that case this court sustained a bill brought by the town to compel the railroad company to restore a public highway, which it had practically destroyed in constructing its road, to its former condition of usefulness to public travel. The jurisdiction of the court was rested upon the ground that a court of equity would compel a railroad corporation to perform the plain statutory duty of restoring the highway which it had invaded to its former state of usefulness, as a condition to using it for the purposes of its roadbed. This duty is imposed by statute by plain and positive language, and a railroad corporation has no warrant in law to invade a highway with its track without complying with the law which grants the privilege to do so. It is contumacious and wrongful conduct for the officers

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of a railroad corporation to occupy a public highway with its track, practically destroying the street for purposes of public travel, and then defy or disregard all law and all authority invoked to compel them to repair the wrong which they have done the public. The courts would be impotent indeed if they could not correct such flagrant invasions of public right."

So that, in the case at bar, the defendant company was under the most positive statutory obligation as well as contractual undertaking to provide a suitable and convenient highway for public travel in the place of the public highway appropriated by it. The last order had in the county court in this matter was dated January, 1892. Formal notice was served in November, 1906, demanding that the defendant company abate the nuisance by removing its railroad out of the public highway, or that it make a suitable public highway in lieu thereof. There are many reasons which might be suggested for this delayed action on the part of the county authorities, such as the railroad company being in the hands of a receiver for some time, etc.; but this is not necessary, for the reason that the public highways belong to the State, and the complainants represent the sovereign State, against whose rights the statute of limitations does not run, nor the doctrine of *laches* apply. As against the government, *laches* cannot be set up as a defense in equity any more than the bar of the statute can at law. *U. S. v. Dallas Military Road Co.*, 140 U. S. 559, 35 L. Ed. 560, 11 Sup. Ct. 988.

In the case of *Bunting v. Danville*, 93 Va. 200, 24 S. E. 830, it is held, in speaking of the dedication of a public highway, that when dedication has become complete and irrevocable, no obstruction of the subject of the dedication, and no encroachment upon it for any length of time, will affect the dedication, or impair the rights of the public to it, unless the land so dedicated has been abandoned by the public, or by the proper authority. "Time does not run against the State, nor bar the right of the public."

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In the case at bar, there has been no abandonment of the right of the public in the highway taken by the defendant company. On the contrary, the county of Carroll has in the most positive terms refused to accept or approve of the road offered by the defendant as a substitute for the highway, and compliance with the requirement of the legislature that an equally convenient road be provided in lieu of the old road was a condition precedent to the occupation of the highway by the railroad.

In *Taylor v. Commonwealth*, 29 Gratt. 780, Judge Moncure, speaking for his court, says: "A valid dedication of a street to the public use, perfected by acceptance, makes it a highway, an unlawful obstruction of which is not legalized by lapse of time. *Nullum tempus occurrit regi* applies in this State to the Commonwealth as it does in England to the King."

In the case of *Norfolk City v. Chamberlaine*, 29 Gratt. 534, it is said: "To the Commonwealth here, as to the King in England, belongs the franchise of every highway as a trustee for the public; and streets regulated and repaired by the authority of a municipal corporation are as much highways as rivers, railroads, canals or public roads laid out by authority of the State."

As said by Chief Justice Gibson in *O'Connor v. Pittsburg*, 18 Pa. St. 187, the legislature of the State alone represents the public at large, and it alone has full and paramount authority over all public highways.

In the light of what has been said, and of the authorities cited, there was no error in overruling the demurrer to the bill on the ground of *laches*.

The question of *laches* has been dealt with thus fully because it is also made the subject of the second assignment of error, which now calls for no further consideration.

The third assignment of error involves the contention that the county authorities had accepted the new road as a performance by the Norfolk and Western Railroad Company of its duty and obligation in the premises.

It has been shown that there was never any acceptance by



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the county court of this new road. The record shows that the public used the new road, and that the county authorities, from time to time, worked and repaired it; but this cannot be construed as an acceptance of the road in the face of the unequivocal refusal of record by the county court to approve and accept the road as a proper discharge by the railroad company of its obligations. The highway of which the public was deprived was an important thoroughfare; it being the only outlet many people had through that mountainous section of the State. The railroad company was permitted to occupy the level and natural highway along the bank of New river in advance, upon the faith of its statutory and contractual obligation to build another suitable road, equally as convenient as the old road. When the railroad was built upon the public road the only outlet left was the new road, and the people had no other alternative than its use, and the public road authorities in that district did what they could to enable the people to pass over it. This enforced use of the new road, for which the railroad company is responsible, cannot be now invoked as an evidence of its acceptance.

The fourth assignment of error is to the action of the circuit court in holding the defendant, Norfolk and Western Railway Company, responsible for the obligations in this matter of the Norfolk and Western Railroad Company; it being contended that the last-named company had been sold under foreclosure proceedings and bought by the defendant company, which was not responsible for the obligations of the Norfolk and Western Railroad Company now sought to be enforced.

The statute in force at the time the defendant company purchased the property of the Norfolk and Western Railroad Company provides that: "The corporation created by or in consequence of such sale and conveyance shall succeed to all such franchises, rights and privileges, and perform all such duties, as would have been had, or should have been performed, by the first company, but for such sale and conveyance; save only that



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the corporation so created shall not be entitled to the debts due to the first company, and shall not be liable for any debts of or claims against the said first company which may not be expressly assumed in a contract of purchase; and the whole profits of the business done by such corporation shall belong to the said purchaser and his assigns." Code, 1887, sec. 1234.

Section 1 of the charter of the defendant company provides that "such new corporation shall have, possess and be invested with all the estate, right, title and interest in and to such railroads and other property, with their appurtenances, and all franchises, powers, rights and privileges had and possessed by said Norfolk and Western Railroad Company to the same extent as a purchaser under sections twelve hundred and thirty-three and twelve hundred and thirty-four of the Code of Virginia, and shall perform all the duties prescribed by said sections of said Code." Acts 1895-96, p. 64.

In view of the obligations assumed by the defendant company under this statute and its charter, the question to be determined is whether the obligation resting upon the first company to make a new public road to take the place of the old road, which the first company had taken possession of and which the new company also took possession of and now occupies, was a duty which the second company can be required to perform.

What the duty is that the purchaser in such a case has to perform is very clearly stated in the case of *Sherwood v. Atlantic & Danville R. Co.*, 94 Va. 291, 26 S. E. 943. In delivering the opinion of the court in that case Judge Keith says: "It is true that the present Atlantic and Danville Railroad Company is a corporation created by and in consequence of such a sale and conveyance as is referred to in the section just quoted (1234), and that it has succeeded to all the franchises, rights and privileges, and is bound to perform all such duties as would have devolved upon the first company but for such sale or conveyance, but it is obvious from the terms of the statute that it was not intended to impose upon the new company any additional

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or higher duty than already rested upon the original company. It is bound to perform 'all such duties' as could have been required of the first company, but only such duties as could have been required of the original company. If a duty rested upon the original company to maintain and operate the line from Shoulder's Hill to a point within the City of Portsmouth of such a character as a court would enforce by *mandamus*, then the new company is equally bound to perform it, and is equally liable to be compelled to do so by *mandamus* or any other appropriate remedy."

In the case at bar the duty of building the new public road unquestionably rested upon the Norfolk and Western Railroad Company, and, not having performed that duty, the responsibility passed to its successor, the defendant company, which is bound to perform "*all such duties as could have been required of the first company.*"

The fifth and last objection is that the decree appealed from directs the defendant company to complete and build a road equally as suitable and convenient as the old road, and to place proper safeguards on the lower side for the protection of the traveling public.

This objection is broad enough to involve a review of all the assignments preceding it. This is, however, unnecessary. It is sufficient to say in conclusion, that the evidence abundantly shows that the Norfolk and Western Railroad Company and its successor in title, the defendant company, have attempted to impose upon the public an inadequate, inconvenient and unsuitable road as a substitute for a good highway along the banks of the river, which has been appropriated by these companies for railroad purposes.

The specifications which the railroad company agreed should govern in building the road were that it should be located according to the map of an engineer filed in the papers; that the grade should not exceed five degrees; that where necessary proper safeguards should be placed on the lower side of the road

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for the protection of the traveling public; that the new road should be equally as good and convenient as the old road running down the river; and that it should be a lawful and suitable road. These terms, agreed to by the railroad company and approved by the order of the county court, are but the measure of duty determined upon as necessary to meet the demands of the statute in the situation brought about by the contemplated change of the public road at the instance and in the interest of the railroad company. The record demonstrates the fact that the railroad company has failed to perform its statutory and contractual obligations with respect to this matter. It has occupied the old road, which was built on the most suitable location to be found in that mountainous section, and substituted therefor an inadequate and dangerous way along precipitous cliffs, which in the beginning, as early as 1891, was reported to be almost impassable. Instead of blasting out the rock so as to secure the necessary width, the road was built on wooden "cribbing," which in a short time rotted and allowed the road to slide down the side of the mountain, thus making it in many places so narrow that vehicles cannot pass without great danger of falling over precipices. There are scarcely any places on the road where vehicles can meet and pass each other.

It is not necessary to point out other serious defects proven by the evidence in the construction of this road. It is enough to say that the railroad company has not performed either the letter or the spirit of its undertaking. As said by the learned judge of the circuit court, "the railroad company has perhaps saved itself many hundreds of thousands of dollars by the construction of its roadbed upon the old county road, and it should at least have provided the county with a suitable road to take the place of the one it occupied." The railroad company having taken the old road and undertaken to build another equally as good and according to certain specifications, cannot be now heard to say that it is inequitable to compel it to perform that under-

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taking. Equity and good conscience require that the defendant railroad company be made to perform this long delayed obligation and duty which it owes to the public.

There is no error in the decree complained of, and it is affirmed.

*Affirmed.*

CARDWELL, J., dissents.

Syllabus.

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**Staunton.**

NORFOLK AND WESTERN RAILWAY CO. v. SPEARS.

September 9, 1909.

1. **DAMAGES—General and Special—How Plead.**—General damages are such as are the natural and proximate result of the act or default complained. They are legally imported, and need not be specially pleaded. Damages which are of an unusual and extraordinary nature and are not the common consequences of the wrong complained of are said to be special damages, and must be specially laid in the declaration.
2. **PLEADING—Declaration—Sufficiency—Sickness and Disorder—Nervous Disorder.**—A declaration which adequately charges a physical injury to the plaintiff, and further avers that by reason of the physical injury the plaintiff became sick, sore and disordered, which condition continued "hitherto," sufficiently warns the defendant to expect evidence of any sickness or disorder, the origin or aggravation of which could be traced to the act or wrong complained of, and it need not be more specifically described. Under such allegation serious nervous disorders may be shown.
3. **PLEADING—Declaration—Sufficiency—Bill of Particulars.**—If a declaration in tort does not plainly describe "the sickness or disorder" alleged to result from a physical injury charged, the defendant may require the needed particularity by calling for a bill of particulars under section 3249 of the Code.
4. **TRIAL—Continuance—Case at Bar.**—A motion for a continuance is addressed to the sound discretion of the trial court, under all the circumstances of the case, and, while its action is subject to review by the appellate court, it will not be reversed unless plainly erroneous. In the case at bar the facts disclosed by the plaintiff's bill of particulars just filed was the ground of the motion. But the bill was not called for till the term succeeding that at which the issue was made up, and this court cannot say, under all the facts and circumstances, that the action of the trial court in refusing a continuance was plainly wrong.
5. **WITNESSES—Experts—Hypothetical Questions—Facts Assumed.**—A hypothetical question propounded to an expert witness will not be rejected for lack of fullness of details when there is evidence

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tending to prove all the facts assumed in the question, and it refers to all the material facts which the evidence tends to prove affecting the question upon which the expert is asked to express an opinion.

6. VERDICT—*Excessive*.—A verdict for \$1,500 for a personal injury resulting in a broken rib, a sprained back and other injuries cannot be set aside as excessive.

7. VERDICT—*Contrary to Evidence—Evidence to Support—Probabilities*.—A verdict of the jury awarding damages for a nervous disorder resulting from a personal injury will not be set aside as contrary to the evidence when there is sufficient evidence for the jury to have concluded that the nervous disorder complained of was more probably due to the injuries received than to any other cause.

Error to a judgment of the Circuit Court of Wythe county in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

*Affirmed.*

The opinion states the case.

*W. B. Kegley, T. H. S. Curd, and Theodore W. Reath*, for the plaintiff in error.

*A. A. Campbell and A. P. Crockett*, for the defendant in error.

BUCHANAN, J., delivered the opinion of the court.

This is an action to recover damages for personal injuries done Mrs. Spears while a passenger on a train of the Norfolk and Western Railway Company, by a collision between the passenger train on which she was traveling and another train of the railway company.

There was a verdict and judgment in favor of Mrs. Spears for \$1,500. To that judgment the railway company obtained this writ of error.

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The first error assigned is that the plaintiff, under the allegations of her declaration, was not entitled to recover damages on account of the nervous disease which she claims resulted from her injuries, and from which she was suffering at the time of the trial. This question was raised in the trial court by objections to evidence and by instructions to the jury.

The declaration, after stating that the railway company was a common carrier, and that the plaintiff was a passenger on one of its trains, and the duty which the company owed to her, avers, among other things, that the train upon which she was riding was run into by another train of the railway company, and "by means thereof the said plaintiff was thrown violently from her seat and was caught between the seats of the said train, and a large suit case fell from the rack of said train, striking the said plaintiff, whereby one of her ribs was broken, her back sprained, and the said plaintiff was otherwise greatly bruised, wounded, hurt and injured, and also by means of the premises the said plaintiff became and was sick, sore, disordered and so continued for a long space of time, to-wit, hitherto, during all of which said time" the said plaintiff suffered great pain, was prevented from attending to her business, was deprived of the profits therefrom and was compelled to expend large sums of money in her efforts to be cured, etc.

On the trial of the cause the plaintiff was permitted to introduce evidence tending to show that she was suffering from a nervous disease, termed *traumatic neurasthenia*, and that this disease probably resulted from the collision of the railway company's train.

The contention of the railway company is that the damages claimed for the said nervous disorder were special damages, which could not be proved without being specifically averred.

It is true that it is not in terms averred in the declaration that the plaintiff, as a result of the collision, was suffering from *traumatic neurasthenia*, or any other named disease; but it is averred that by reason of the physical injuries inflicted by the

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collision she became and was sick, sore and disordered, which condition continued "hitherto"—that is, up to the time of the filing of the declaration.

In order to recover what is termed *special damages*—that is, damages of an unusual and extraordinary nature and not the common consequences of the wrong complained of—they must be specifically laid in the declaration. See *Wood v. Am. Nat'l Bank*, 100 Va. 306, 309, 40 S. E. 931, 932; 13 Cyc. 176-7. But "when the damages," as was said in the case cited, "are the natural and proximate result of the act or default complained of, they are *general*, are *legally imported* from such act or default, and need not be *specially pleaded*."

The general rule in tort, says Sutherland on Damages, Vol. 3 (2d ed.), pp. 2661-3, is that the party who commits trespass or other wrongful act is liable for all the direct injury resulting, although such injury could not have been contemplated as the probable result of the act done. Plaintiff may show specific direct effects of the injury without specially alleging them."

The declaration in this case avers, as one of the results of the plaintiff's injuries, that she became and was sick and disordered, and claims damages therefor. When the railway company was informed that damages were sought for sickness and disorder and their attendant expenses, as well as for damages for wounds and bruises, it was bound to expect evidence of any sickness or disorder, the origin or aggravation of which could be traced to the act or wrong complained of, and the rules of pleading did not require any more specific description of the sickness or disorder from which the plaintiff was suffering than was given in the declaration. See *Denver, &c., Co. v. Harris*, 122 U. S. 597, 30 L. Ed. 1146, 7 Sup. Ct. 1286; *Montgomery v. Lansing*, 103 Mich. 46, 61 N. W. 543, 29 L. R. A. 287, 290; *Tyson v. Booth*, 100 Mass. 258; *Manly v. Delaware, &c.*, 69 Vt. 101, 37 Atl. 279; *Ehrgott v. City of New York*, 96 N. Y. 265, 278, 48 Am. Rep. 622.



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No injury could result to the railway company from this mode of pleading, since under section 3249 of the Code it had the right to call for a bill of particulars in which the plaintiff was required to describe plainly the sickness or disorder for which she claimed damages, or run the risk of having her evidence on that subject excluded when offered.

The next error assigned is to the action of the court in refusing to continue the case upon the railway company's motion, at the August term, 1908, of the court.

The action was instituted in March of that year. The railway company, after its motion to strike out certain portions of the plaintiff's declaration and its demurrer to the declaration had been overruled, pleaded not guilty, upon which plea issue was joined and the cause continued. At the August term of the court the railway company, after its motion to have physicians appointed to examine the plaintiff for the purpose of ascertaining the nature and extent of her injuries had been overruled, moved the court to require the plaintiff to file a bill of particulars of her claim. The order was made and the bill of particulars was at once filed. Thereupon the defendant company, upon "the ground that it was taken by surprise at the elements of damages claimed by the plaintiff in her bill of particulars and allowed by the court to be claimed, and that it had previous to the calling of the case no notice that the plaintiff claimed to be suffering from *traumatic neurosis*, or from any permanent disability or disease, as the result of the injuries complained of," moved the court to continue the case to enable it to produce witnesses to testify as experts upon the question of the existence of the nervous disorder of which the plaintiff complained and for which she sought to recover damages, and in order that it might produce a nerve specialist and apply for an order of court for the examination of the plaintiff by him before the trial of the cause. This motion the court overruled, upon the ground that the pleadings were made up at the last term of the court and no bill of

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particulars was called for until the calling of the cause for trial at that term of the court.

A motion for a continuance is addressed to the sound discretion of the court, under all the circumstances of the case; and though an appellate court will supervise the action of the trial court on such a motion, it will not reverse the judgment on that ground unless it is plainly erroneous. *N. & W. Ry. Co. v. Shott*, 92 Va. 30, 45, 22 S. E. 811, and cases cited; *Kinzie v. Riley*, 100 Va. 709, 718, 42 S. E. 872.

If the defendant company desired a bill of particulars it ought to have called for it at the April term when the pleadings were made up, and not delayed doing so until the next term of the court. Upon the trial of the cause the defendant introduced five medical witnesses, all of whom testified as to the nervous disorder of which the plaintiff complained. Further, it did not appear that the nerve specialist whom the defendant company wished to examine the plaintiff was within the jurisdiction of the court.

This court cannot say that under all the facts and circumstances of the case the trial court plainly erred in not continuing the cause.

The assignments of error as to the court's action in admitting certain evidence and in giving and refusing certain instructions are all based upon the contention that the declaration was not broad enough to admit evidence of the character given. It is conceded in the petition, in effect, that if the declaration was broad enough to entitle the plaintiff to recover damages for the nervous disorder of which she complained, as we have seen it was, then these assignment of error are without merit, except as to the action of the court in permitting to be answered a hypothetical question mentioned in bill of exception No. 4.

The objection made to that question is that it fails to set forth fully and correctly the facts in evidence upon which the question should have been predicated.

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There was evidence tending to prove all the facts assumed in the hypothetical question, and it referred to all the material facts which the evidence tended to prove affecting the question upon which the experts were asked to express an opinion. While it might have gone into the details of the evidence more fully, it cannot be said that it omitted any material fact which it ought to have contained or contained any statement which the evidence did not tend to prove.

The remaining assignment of error is to the refusal of the court to set aside the verdict of the jury.

It is conceded (and if it were not, it is clear from the evidence) that the railway company was guilty of negligence and was liable to the plaintiff. Independent of the nervous disorder of which the plaintiff claimed she was suffering, and which the railway company claims was not satisfactorily shown to have resulted from its negligence, it cannot be said that the verdict (\$1,500) was not justified by the actual injuries and the damages resulting therefrom which the uncontradicted evidence tends to show the plaintiff had sustained. Certainly it could not be set aside as excessive, under the well settled practice of this court in such cases. But there was sufficient evidence upon which the jury might properly have reached the conclusion that the nervous disorder complained of was more probably due to the injuries received in the collision than to any other cause.

Upon the whole case we are, therefore, of opinion that the judgment should be affirmed.

*Affirmed.*

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**Staunton.**

NORFOLK AND WESTERN RAILWAY CO. v. WITT.

September 9, 1909.

1. MASTER AND SERVANT—*Negligence—Proof Required—Case at Bar.*

Negligence must be established by affirmative evidence which must show more than a mere probability of a negligent act. The existence of negligence must not be left wholly to conjecture, but the evidence must be such as to satisfy reasonable and well balanced minds that the injury complained of resulted from the negligence of the defendant. Moreover, in seeking to charge a master, it must be borne in mind that he is not compelled to foresee and provide against that which reasonable and prudent men would not expect to happen. Nor can the negligence of the master be inferred from the mere occurrence of an accident by which his servant is injured. That fact alone does not raise even a *prima facie* presumption that the master has been guilty of negligence or a breach of duty to his servant. In the case at bar the evidence shows that the plaintiff's injuries resulted from a pure accident which could not have been anticipated or provided against by reasonably prudent men.

Error to a judgment of the Circuit Court of Tazewell county in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

*Reversed.*

The opinion states the case.

*S. D. May and Henry & Graham*, for the plaintiff in error.

*W. H. Werth*, for the defendant in error.

HARRISON, J., delivered the opinion of the court.

This action was brought to recover damages for personal injuries alleged by the plaintiff to have been sustained by him as a

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result of the negligence of the defendant railway company. There was a verdict and judgment in favor of the plaintiff, which this writ of error brings under review.

In the view we take of the case it is only necessary to consider the last assignment of error which calls in question the action of the circuit court in refusing to set aside the verdict of the jury as contrary to the law and the evidence.

The record shows that two crews of section hands, near Maxwell station on the defendant's road, loaded a flat car, which formed part of a "work train," with worn rails which had previously been taken up from the track. The rails were 28 feet long, each weighing about 625 pounds. The last rail thrown upon the car was somewhat curved, so that it did not lie straight but slightly across the car. The plaintiff was a section hand working with one of the crews mentioned, and took an active part in the work of loading the rails on the car. When the car was loaded, the men of the two crews, including the foreman of each, boarded the train as it started, the conductor intending to stop further west to load some additional rails. The plaintiff says that he boarded the second car from the one he had helped to load, leaving a flat between him and the loaded car. He further says that he first sat for a while on the edge of the car, but that at the time of the accident he had gotten up and was standing on the same car, with his back toward the flat that had the rails on it, with his hat pulled down over his eyes to protect him from the cinders. When the train had proceeded about one quarter of a mile, at the usual rate of speed, at the entrance of a cut on a curve, the bent rail was thrown off the car by its motion in going around the curve, striking the bank of the cut and sweeping back over the train of cars, striking the plaintiff and knocking him under the cars, thus causing the injury complained of.

These are the salient facts upon which the defendant company is charged with negligence in causing the injury for which compensation is sought in damages.

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The negligence of the master cannot be inferred from the mere occurrence of an accident by which his servant is injured. That fact alone does not raise even a *prima facie* presumption that the master has been guilty of negligence, or a breach of duty to his servant. Negligence of the master is an affirmative fact to be established by the injured servant. *Moore Lime Co. v. Johnson*, 103 Va. 84, 48 S. E. 557.

Every party to an action at law has a right to insist upon a verdict or finding based upon the law and the evidence in the case, and not, in the absence of evidence, upon mere inference and conjecture. *Southern Ry. Co. v. Hall*, 102 Va. 135, 45 S. E. 867.

Negligence must be established by affirmative evidence, which must show more than a mere probability of a negligent act. The existence of negligence must not be left wholly to conjecture, and, in determining whether or not an act or omission of the master was negligent, it must be borne in mind that the master is not compelled to foresee and provide against that which reasonable and prudent men would not expect to happen. *N. & W. Ry. Co. v. McDonald*, 106 Va. 207, 55 S. E. 554.

In the case at bar, the grounds of the defendant's negligence are alleged to be that the conductor of the train failed to see that the rails were so loaded on the car that they would not fall off or get displaced by the motion of the car; that he failed to provide suitable and sufficient standards to hold the rails on the car; that no precautionary measures were taken to secure the bent rail, which would not lie flat or parallel with the other rails and was, therefore, more easily displaced by the motion of the car; that the train was started so quickly after the loading that the men did not have time to secure the safety of the load; that the bent rail should have been straightened before it was put on the car; that no instruction or warning was given the plaintiff as to the dangers to be apprehended from doing the work; and that it was negligence to permit a boy of the plaintiff's age and experience to take part in such work.

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The evidence fails to sustain any one of these allegations. On the contrary, it is satisfactorily shown that the conductor of the train and both the foremen who had charge of the work of loading the rails were experienced and cautious men who understood the work in hand; that the rails were loaded in the usual and ordinary way in which such work was generally done; and that there was nothing in the way the rails were loaded to suggest to them danger, even the probability, of an accident. It further appears that the car was equipped with a sufficient number of iron standards, such as are generally used for hauling heavy iron rails, to hold the load under the ordinary and usual circumstances attending the execution of such work; that the train was started in the usual and ordinary way, some of the men jumping on as the train moved off. It is further manifest from the record that the starting of the train did not have the remotest connection with the accident. The testimony shows that the rails were properly loaded, and that there was nothing further for the men to do before the train moved off. Loading the rails was a very simple operation, consisting of lifting the rail with the hands and throwing it on the car, needing no instruction as to the method. Seeing it done was the best instruction, if any was wanted. It appears that all of the laborers were told by the foreman to be cautious.

There is no evidence tending to show that it was negligence for the defendant to employ the plaintiff, who was an efficient, intelligent young man, eighteen years of age.

We are of opinion that under the evidence adduced, the plaintiff was not entitled to recover. The evidence must be such as to satisfy reasonable and well balanced minds that the injury resulted from the negligence of the defendant. *Consumers Brewing Co. v. Doyle*, 102 Va. 399, 46 S. E. 390.

As said by this court in *N. & W. Ry. Co. v. Cromer*, 101 Va. 671, 44 S. E. 899: "The existence of negligence must

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not be left entirely to conjecture, and courts cannot uphold the tentative conclusions of juries based upon no sure grounds of inference."

The evidence in the case at bar shows that the plaintiff's injuries resulted from a pure accident that was not to be anticipated or provided against by reasonably prudent men, and for which the defendant company cannot be held liable.

The judgment complained of must be reversed, the verdict set aside, and a new trial granted, if the plaintiff be so advised, to be had not in conflict with the views expressed in this opinion.

*Reversed.*



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Syllabus.

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**Staunton.**

## PACK AND WIFE v. WHITAKER AND OTHERS.

September 9, 1909.

1. EQUITY PLEADING—*Multifariousness—Deficiency in Land—Defective Title—Complete Relief.*—A bill is not multifarious which seeks redress for deficiency in land, and defect of title to part of the tract, where both demands arose out of the same contract and are so correlated that separate suits would be inconvenient and not afford complete redress. Moreover, jurisdiction to grant redress for the deficiency in quantity is clear, and equity, having acquired jurisdiction for this purpose, will retain the cause and do complete justice between the parties.
2. INJUNCTIONS—*Collection of Purchase Price of Land—Defective Title.*—Equity will enjoin the collection of the purchase money of land on the ground of defect of title, after a vendee has taken possession under a conveyance from his vendor with general warranty, if the title is questioned by a suit either prosecuted or threatened, or if the purchaser can show clearly that the title is defective.
3. DEEDS—*Construction—Conflicting Causes—Habendum—Case in Judgment—Omission of Name in Deed.*—Deeds should be read as a whole, and effect given, as far as possible, to the evident intention of the parties. If it appears from the whole instrument that there is a variance between the granting and the *habendum* clauses, the latter will prevail. In the case in judgment the name of one of the grantees was omitted from the *habendum* clause, but it is manifest that the omission was an oversight, and the instrument should be construed as if the name had been inserted in the *habendum* as well as the granting clause.
4. VENDOR AND PURCHASER—*Sale of Land—Whether in Gross or by the Acre.*—Where an agreement is entered into for the payment of a gross sum for a tract of land upon an estimate of a given number of acres, the presumption is that the quantity influenced the price to be paid, and that it is a sale by the acre and not in gross, unless the contrary is made to appear plainly. A sale of a given number of acres, "more or less," will be construed to be a sale

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by the acre, unless it be clearly shown that a sale in gross was intended. While contracts of hazard are not invalid, they are not favored in courts of equity.

Appeal from a decree of the Circuit Court of Tazewell county. Decree for the complainant. Defendants appeal.

*Affirmed.*

The opinion states the case.

*Chapman & Gillespie* and *A. S. Higginbotham*, for the appellants.

*Greerer & Gillespie*, for the appellees.

WHITTLE, J., delivered the opinion of the court.

This is a suit in equity by the appellees to enjoin the appellants from collecting the last installment of purchase money of a tract of land situated in Tazewell county, Virginia, sold by them to the plaintiffs, and to recover of the defendants for a deficiency in quantity, and for a defect in title of the land sold.

The bill alleges that both the contract of sale and conveyance were for 50 acres of land, at \$20 per acre; and that there was a deficiency in acreage, and a defect in title to part of the land.

The defendants demurred to the bill, and answered, insisting that the sale was not by the acre, but in gross, and that their recorded title advised the plaintiffs that they only had a life estate in a portion of the land. Subsequently the defendants filed a cross-bill seeking rescission of the contract, to which bill the plaintiffs demurred.

The depositions of witnesses were taken with respect to the circumstances attending the execution of the contract of sale. At

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the hearing the court overruled the demurrer to the original bill, and denied the prayer of the cross-bill, and held that the sale was a sale by the acre and not in gross, and moreover, that the title of the defendants was in part defective. And having ascertained by survey the shortage in the land to be 15.3 acres, proceeded to determine and establish the amounts which the plaintiffs were entitled to recover by reason of deficiency in quantity and defect of title, and referred the case to a commissioner for certain accounts. Thereupon Pack and wife obtained an appeal to this court.

The grounds of demurrer relied on are that the bill is multifarious, in that it sets out two distinct causes of action, namely, deficiency in acreage and defect in the title to the land; that an eviction is not alleged, and therefore suit cannot be maintained for defect of title, and, if it could be, that the remedy is not in equity but at law to recover damages for breach of warranty; that the plaintiffs have a complete and adequate remedy at law; and, lastly, that the bill incorrectly construes the deed to part of the land, limiting the estate of the defendants to a life estate instead of a fee simple.

There is no merit in any of these grounds of demurrer. The bill, it is true, seeks redress for deficiency in land and defect of title, but both demands arose out of the same contract and are so correlated that separate suits would be inconvenient and would not afford complete redress. *School Board v. Farish*, 92 Va. 156, 23 S. E. 221; *Johnson v. Black*, 103 Va. 477, 49 S. E. 633, 106 Am. St. Rep. 890, 68 L. R. A. 264.

Nor can there be any question of the jurisdiction of equity in this class of cases. Our reports are replete with illustrations of that doctrine; and, upon familiar principles, equity having assumed jurisdiction for injunctive relief and to compel the vendors to make compensation for deficiency in quantity of the land, will retain it and do complete justice between the parties, and will not relegate the plaintiffs to a court of law to recover damages for breach of warranty of title.

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In *Koger v. Kane's Admr.*, 5 Leigh 606, the principle is succinctly stated as follows: "Sale of Land—Defect of Title—Injunction Against Collection of Purchase Money. In Virginia, equity will enjoin the collection of the purchase money of land on the ground of defect of title, after vendee has taken possession, under conveyance from vendor with general warranty, if the title is questioned by a suit either prosecuted or threatened, or if the purchaser can show clearly that the title is defective."

In *Renick v. Renick*, 5 W. Va. 285, it is said: "In the case of *Clark v. Hargrave and Others*, 7 Gratt. 399, which in its main facts is like the case under review, relief was granted the vendee by abating from the purchase money the relative value of the part of the lands purchased, for which the vendor had not title. The vendee, in that case, was in possession of the land purchased, under a deed with covenants of general warranty, without other covenants, and alleged in his bill the defect in the title, as to a part of the land, and that the vendor was 'probably in doubtful circumstances.' The bill was dismissed by the circuit court, on demurrer, but the court of appeals reversed the decree and held that the vendee was entitled to relief (although there was no threatened or impending suit or eviction), and was not bound in such a case of clear defect of title, to risk the hazard of his vendor's solvency." See also *Ralston v. Miller*, 3 Rand. 44, 15 Am. Dec. 704; *Morgan v. Glendy*, 92 Va. 80, 22 S. E. 854.

In *Boschen v. Jurgens*, 92 Va. 459, 24 S. E. 390, Keith, President, after citing a number of decisions by this court, observes: "These cases not only show that equity will take jurisdiction of this class of cases, upon the ground of mistake, but that every sale of real estate, where the quantity is referred to in the contract, and where the language of the contract does not plainly indicate that the sale was intended to be a sale in gross, must be presumed to be a sale by the acre; that while

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contracts of hazard are not invalid, courts of equity do not regard them with favor."

We do not think that the ground of demurrer which questions the correctness of the construction placed in the bill upon the deed from Fleman Pack to the defendants is well taken. The deed "grants unto the said William Pack and Angeline Pack, with general warranty, all that certain tract of land . . . . and it is further stipulated in this deed that the said William Pack shall have this land during their lifetime and at their death it shall be the property of their children to have and to hold."

The deed plainly shows that it was the purpose of the grantor to convey the land to William Pack and Angeline Pack for their lives, with remainder to their children, and read as a whole it is apparent that the names of Angeline Pack was inadvertently omitted from the latter clause. Unless the deed be so construed, the granting clause, so far as Angeline Pack is concerned, is meaningless. The two clauses, however, when read together, show that the omission of her name from the latter clause was the result of oversight. That clause was intended to read as follows: "It is further stipulated in this deed that the said William Pack and Angeline Pack shall have this land during their life." That was evidently the intention of the grantor, and the deed should be so interpreted. *Harman v. Howe*, 27 Gratt. 676; *Hutchings v. Commercial Bank*, 91 Va. 68, 20 S. E. 950; *Va. & Ky. Ry. Co. v. Heninger* (decided at the present term), *post* p. 301, 65 S. E. 495.

There is no repugnancy between the granting and the *habendum* clauses, since the former does not, in terms grant a fee simple estate.

"The purpose of the *habendum* is to define the estate which the grantee is to take in the property conveyed, whether a fee, life estate, or other interest." Devlin on Deeds, sec. 213.

"If it appears from the whole instrument that it was intended by the *habendum* to restrict or enlarge the estate conveyed by

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the words of the grant, the *habendum* clause will prevail." *Ib.*, sec. 214.

In the answer the defendants concede that they only took a life estate in part of the land conveyed.

We are of opinion that the lower court rightly overruled the demurrer to the bill.

On the principal question, whether the sale was by the acre or in gross, there is great conflict in the oral testimony, but both the written contract of sale and the conveyance describe the land as containing "50 acres more or less," and such language constitutes a sale by the acre, unless it plainly appears that a sale in gross was intended.

In *Triplett v. Allen*, 26 Gratt. 721, 21 Am. Rep. 320, it was held, where "the conveyance of the land, after giving the number of acres, adds the words 'more or less,' these words will not relieve the vendor or vendee, as the case may be, from the obligation to make compensation for an excess or deficiency, beyond what may be reasonably attributed to small errors from variation of instruments or otherwise, unless there be evidence to show that a contract of hazard was intended." In that case 10 acres in a tract of 166 acres was said not to be covered by the phrase "more or less."

In *Epes v. Saunders*, 109 Va. 99, 63 S. E. 428, the leading decisions of this court on the subject are cited for the proposition that "Where an agreement is entered into for the payment of a gross sum for a tract of land upon an estimate of a given number of acres, there is a presumption that the quantity influences the price to be paid, and that it is a sale by the acre and not a sale in gross, unless the contract plainly indicates that it is a sale in gross; and this presumption can only be overcome by clear and cogent proof."

Upon the facts in the case, the circuit court could not have reached any other conclusion than that the sale was a sale by the acre and not in gross; and, having determined that the

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plaintiffs were entitled to the relief prayed for, the prayer of the cross-bill for rescission was necessarily denied.

Upon the whole case, the decree under review is without error and must be affirmed.

*Affirmed.*

Statement.

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**Staunton.**

PERCY AND OTHERS, TRUSTEES v. FIRST NATIONAL BANK OF  
LOUISA, KY.

September 9, 1909.

Absent, Cardwell, J.

1. EVIDENCE—*Parol Evidence to Vary Writing*.—Evidence of a contemporaneous parol agreement is not admissible to vary or contradict the terms of a valid written instrument, except in cases of fraud or mistake. This is an oft-repeated established axiom of jurisprudence.
2. REFORMATION OF INSTRUMENTS—*Presumption—Burden of Proof—Case in Judgment*.—While courts of equity have jurisdiction to reform written instruments on the ground of mutual mistake, yet the presumption is that the writing speaks the final agreement of the parties, and the burden is on the complainant to overcome this presumption, and to do so the mistake must be plain and established by the clearest and most satisfactory proof. In the case in judgment the evidence, taken as a whole, decidedly preponderates in favor of the deed in controversy as the final consummation of the intention of the parties.
3. WAIVER—*Ignorance of Rights*.—Creditors secured by a deed of trust cannot be held to have waived their security if they were ignorant of its existence at the time of the alleged waiver.

Appeal from a decree of the Circuit Court of Bedford county. Decree for defendants. Complainants appeal.

*Affirmed.*

The opinion states the case.

Wm. R. Abbot, Jr., and S. S. Lambeth, Jr., for the appellants.

M. S. Burns and J. R. Tucker, for the appellees.



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HARRISON, J., delivered the opinion of the court.

In July, 1906, Roberts, Bromley, and Wilson, doing business as T. H. Roberts & Co., and Robert Ferguson & Co., were sub-contractors doing concrete construction for certain railroad builders in Virginia. Having become financially involved, they made an assignment conveying to A. B. Percy and others, trustees, their whole outfit for concrete construction, consisting of machinery, mules, horses, wagons, harness, camp supplies, material on hand, and all other chattels or articles of every description, wherever located, that had been used or were to be used in and about their works; also all moneys, accounts, claims, estimates of work done, retainage for work done, etc., of whatsoever character, due to them from the general contractors and the Tidewater Railway Company, or that would thereafter become due to the grantors, in the prosecution by any of them of the work provided for in the assignment. After providing for the payment of costs and charges, the trust is declared to be for the purpose of securing "the payment ratably of all creditors of the said parties of the first part as the same would or might be paid had bankruptcy proceedings against them been instituted and matured, as of to-day." The deed of assignment concludes as follows: "After the payment of the claims of all creditors of the said parties of the first part . . . if any balance remain the same shall be paid over to the parties of the first part, ratably."

In June, 1907, the bill in this cause was filed by the trustees named in the deed mentioned, alleging that at the time of the assignment the grantors had creditors in the State of Kentucky, as well as in the State of Virginia, and that some of the Virginia creditors had secured attachments upon the assets which were conveyed to the trustees. They further allege that prior to the execution of the deed conferences were held between the grantors and the Kentucky creditors, which were participated in by attorneys representing certain of the Vir-

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ginia attaching creditors, at which conferences it was agreed that the Kentucky creditors should postpone the payment of their claims under the deed of trust until the Virginia creditors had been paid in full; that in consideration of this stipulation, the Virginia creditors should renounce their purpose of instituting actions against the grantors in the Kentucky courts, should waive any right to proceed against the grantors in the Virginia courts as absconding debtors, and that such of the Virginia creditors as had secured attachments should release the same and permit the work to proceed to completion, to the end that the assets and profits might be disbursed in the manner prescribed by this alleged parol agreement. It is further alleged that in violation of this parol agreement the Kentucky creditors claim the right, under the deed of trust, to participate ratably with the Virginia creditors in the distribution of the trust assets; and the prayer of the bill is that the trustees may be instructed as to the right of the Kentucky creditors to participate ratably with the Virginia creditors in such assets, to the end that they may be protected in the administration of their trust.

The Kentucky creditors, in their answer, deny the material allegations of the bill, especially the alleged parol agreement, and insist that they have done nothing to waive their rights under the deed of assignment. They also deny that they have done any act that in equity or good conscience would preclude them from participation in the trust fund in question.

The grantors, Roberts and Bromley, in their answer to the bill, deny that they were parties to any agreement that was to result in preferring any one or more of their creditors over another. On the contrary, they assert that their understanding always was, that their Kentucky creditors were to share ratably in the trust assets with their other creditors, and say that if this agreement had not been embodied in the deed they would not have executed it.

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The circuit court declined to reform the deed of trust so as to make it conform to the alleged parol agreement, and held that the deed should remain in full force and effect, as executed by the grantors, for the benefit of all their creditors. From that decree this appeal has been taken.

The contention of the trustees, who are the complainants in the bill and the appellants here, is that the deed of assignment, as drawn, does not express the agreement as made between the parties to the deed, and that, therefore, a court of equity will reform the instrument so as to make it correctly express the true agreement. It is also insisted that the Kentucky creditors have, by their contract and by their conduct, waived their right to participate in the fund in the hands of the trustees; and that the Virginia creditors who had attachments, having released the same on the faith of the alleged parol agreement, the Kentucky creditors are in equity estopped to assert their claims to the prejudice of the Virginia creditors.

The general principle, that evidence of a contemporaneous parol agreement is not admissible to vary or contradict the terms of a valid written instrument, except in cases of fraud or mistake, is so familiar and well established that citation of authority in its support would seem to be superfluous. It is a principle founded in wisdom, and cannot be too carefully guarded. Upon its enforcement the certainty and sanctity of written contracts depend, and its violation would be destructive of the most solemn transactions of life. This court has often discussed this subject, and adhered without variation to the rule of evidence adverted to as an established axiom of our jurisprudence. *Carlin v. Fraser*, 105 Va. 216, 53 S. E. 145 and cases there cited.

While courts of equity have jurisdiction to reform written instruments on the ground of mutual mistake, yet the presumption is that the writing speaks the final agreement of the

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parties, and the burden is on the complainant to overcome this presumption, and to do so the mistake must be plain, and established by the clearest and most satisfactory proof. *Donaldson v. Levine*, 93 Va. 472, 25 S. E. 541; *Railroad Co. v. Dunlop*, 86 Va. 346, 10 S. E. 239.

In the case of *Carter v. McArtor*, 28 Gratt. 356, 360, Judge Staples, speaking for the court, says, that "although a deed or other instrument may be reformed, when through mistake or accident it does not accurately represent the agreement of the parties, it is necessary that both the agreement and the mistake shall be made out by the clearest and most satisfactory testimony."

In the case at bar, the deed is an elaborate and carefully drawn memorial of the scheme and purpose had in view. No fraud or mistake in its preparation or execution is either alleged or attempted to be shown. On the contrary, the draughtsman, who was one of the trustees, frankly admits that it was drawn with deliberation, and that the provision for the payment of all the creditors ratably was inserted advisedly for the purpose of forestalling an attack by creditors in the bankrupt courts. Apart from the fact that no mistake is alleged or proven, the evidence is wholly insufficient to support the alleged parol agreement that the Kentucky creditors were to be postponed until the Virginia creditors were paid in full. Taking the evidence as a whole, the preponderance is decidedly in favor of the deed as the final consummation of the intention of the parties.

In support of their contention, appellants rely upon the cases of *Alexander v. Newton*, 2 Gratt. 266, and *Mauzy v. Sellars*, 26 Gratt. 641. The facts in these cases are essentially different from those in the case at bar. In each a clear mistake of the scrivener was both alleged and proven. In each it was held that a court of equity would reform a mutual mistake clearly proved by parol evidence. In neither does the view

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taken in any way conflict with the conclusion reached in the present case, that the appellants have failed to sustain the burden which rests upon them of establishing the alleged parol agreement which they seek to set up as a substitute for the plain provision of the deed, deliberately made for the equal benefit of all the creditors of the grantors.

The record does not sustain the contention that the Kentucky creditors have at any time, either by express or implied agreement, waived their right to participate in the fund for distribution in the hands of the trustees. On the contrary, the evidence satisfactorily shows that they never did waive such right. The bill alleges that about seven months after the deed was executed the Kentucky creditors discovered for the first time that the deed of assignment secured their claims, and that they immediately gave notice of their intention to assert their claims, and did file them with the trustees for the purpose of receiving their distributive share of the funds.

Taking this allegation as true, it is a sufficient answer to the contention that any rights were waived by the Kentucky creditors prior to their demand for participation in the funds; for if they did not until then know of their rights, they could not waive them. *Wilson v. Carpenter*, 91 Va. 183, 21 S. E. 243, 50 Am. St. Rep. 824; *Hotchkiss v. Middlekauf*, 96 Va. 649, 32 S. E. 36, 43 L. R. A. 806.

In the view already taken of the evidence in this case as to the alleged parol agreement, it is unnecessary to discuss the question of estoppel raised with respect to the dismissal of the attachments held by the Virginia creditors, except to say that such dismissal was voluntary. A careful consideration of the whole deed and the evidence leaves the decided impression that the scheme and purpose of the Virginia creditors who were present was to withhold the prosecution of their claims, as an inducement to the grantors to resume the work abandoned by them because of financial embarrassment, in the hope of

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thus realizing their debts, which might otherwise be lost or considerably reduced.

There is no error in the decree appealed from and it is affirmed.

*Affirmed.*

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Statement.

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**Staunton.**

## PILKERTON AND ANOTHER v. ROBERSON.

September 9, 1909.

1. BOUNDARIES—*Conflicting Evidence—Verdict of Jury.*—Where the evidence is conflicting as to the true location of a disputed boundary line, and as to acts of ownership exercised over the land by the claimants and those under whom they claim, the location of the line is peculiarly a question for the jury, under proper instructions from the court, and their verdict will not be set aside unless it is plainly wrong.
2. BOUNDARIES—*Declaration of Parties—Suspicious Circumstances—Objections.*—Declarations of a party in interest, after a controversy has arisen with reference to a disputed boundary, which are made under suspicious circumstances, should not be received, if objected to; but if received without objection, they must be considered along with the other facts and circumstances tending to establish the boundary.
3. INSTRUCTIONS—*Taking Case from Jury—Insufficient Evidence.*—It is not error to grant an instruction which takes away from the jury the consideration of evidence which is not sufficient to support a verdict found in accordance therewith.
4. BOUNDARIES—*Surveys—Courses and Distances—Lines of Other Surveys.*—Where a call is for running to the line of another survey, generally course must yield and the line be so run as to reach the line of the survey called for at such point (if no object be named in the deed) as will least change the course, and be most in accord with the next call of the conveyance.
5. BOUNDARIES—*Surveys—Construing Calls.*—In construing a conveyance or in applying it to its subject matter, effect should be given, as far as possible, to all of its provisions. A call to "Hall's line, and with his lines to Indian Creek," is not answered by running the line to the point where Hall's line crosses Indian Creek. This would entirely ignore the call for running with Hall's lines.

Error to a judgment of the Circuit Court of Wise county in an action of ejectment. Judgment for the plaintiffs. Defendants assign error.

*Affirmed.*

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Opinion.

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The opinion states the case.

*Ayers & Fulton*, for the plaintiffs in error.

*Bond & Bruce* and *Irvine & Morison*, for the defendants in error.

BUCHANAN, J., delivered the opinion of the court.

This is an action of ejectment for the recovery of about sixty acres of land. Both parties claim under a common grantor, and the title to the land in controversy depends upon the true location of the line of the senior purchaser which is called for by the title papers of the junior purchaser.

The land of the former is described in his title bond and deed as follows: "Beginning at a large white oak on the south bank of Lick Fork of the Pound River at the upper end of a cliff of rocks, and from said tree up the hill about six rods to another white oak standing on a bench in a hill side, then in a straight line passing said tree to Isom Hall, Sr., lines, and with his lines to Indian Creek, then down the creek to William Roberson's Pound tract and with the Pound River and with the lines of another tract belonging to said Roberson and again with the river to the beginning. . . ."

The line in controversy is that called for by the italicised portion of the description quoted.

The plaintiff in the trial court (the defendant in error here) claims that the white oak called for at about six poles from the beginning corner (which is not in dispute) was at one point, and the defendant claims it to have been at another. Both parties meet with difficulties in establishing their respective contentions. The tree claimed by the plaintiff is no longer standing. The place where it stood was rather "around the hill on the hill side" than "up the hill on a bench." It was marked as a line tree, but by whom does not appear except by



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the self-serving declarations of the then owner after the controversy as to the location of the tree called for had arisen. Its location is about 7 1-2 poles instead of 6 from the beginning corner. A straight line from the beginning corner passing the point where the tree stood will not reach Isom Hall's line unless extended over 50 poles, but does reach a point where the evidence tends to show it was thought Hall's line ran.

On the other hand, the tree claimed by the defendant is standing, is marked as a line tree, is "up the hill" and on a "bench." It is about 8 2-3 poles instead of 6 poles from the beginning. A straight line passing by it will not reach Isom Hall's line, but goes to Pound River, about one-half a mile below.

The land in controversy was of little value when sold by the common grantor, each boundary embraces much more land than it was estimated to contain when conveyed, and it is very doubtful whether the line in dispute was ever run until about the time the controversy as to its true location arose. The evidence is conflicting as to the claims asserted and the acts of ownership exercised over the land by the parties and those under whom they claim.

The location of the line was peculiarly a question for the jury, under the facts and circumstances of the case, under proper instructions by the court. The motion of the defendant to set aside the verdict was, therefore, properly overruled by the court, unless it erred in submitting the case to the jury.

The objections made to certain evidence introduced by the plaintiff, as set out in bills of exception numbered 3, 4 and 5, do not seem to be much relied on; and, if they were, seem to be without merit.

The court gave two instructions—No. 1 asked for by the plaintiff, and No. 2 of its own motion—both of which were objected to by the defendant.

Instruction No. 1 is as follows: "The court instructs the jury that if they believe from the evidence that the white oak

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tree referred to in the proof as the James Roberson tree was the tree referred to—in the original title bond of 1851 from the Warders to William Roberson and others, and in the deed from Davis, agent of the Warders, to James and A. G. Roberson, of April 16th, 1888—then they shall find for the plaintiff.”

This instruction is objected to on several grounds: (1) That there was no sufficient evidence upon which to base it; (2) that it cannot be determined from the terms of the deed “what was meant” by the call for the line in dispute, and that it must, therefore, be rejected as too vague and indefinite to be located at all; (3) that it took away from the jury the consideration of evidence tending to show an adversary possession for the statutory period, or such continued possession, use and claim of same as would authorize the presumption of a conveyance to Gibson, under whom the defendants claim, prior to the conveyance of Warder (the common grantor) to Roberson, under whom the plaintiffs claim.

As to the first objection: It is true, as argued by the counsel of the defendants, that the declarations of James Roberson, a deceased owner, as to the identity of the tree called the “Roberson tree,” were made after the controversy as to the location of that call of the deed arose, and were made under circumstances which rendered them suspicious, and, if objected to, ought to have been excluded. *Harriman v. Brown*, 8 Leigh 697; *Clements v. Kyle*, 13 Gratt. 478; *Fry v. Stowers*, 92 Va. 14, 22 S. E. 500. But they were admitted without objection, and were to be considered along with the other facts and circumstances tending to establish the identity of the “Roberson tree” as the white oak called for in the title bond and deed. 2 Elliott on Ev., sec. 881.

The declarations of James Roberson as to the identity of that tree as a line tree and the other facts and circumstances in evidence tending to show that it was the tree called for, and that the other white oak, called the “Aston tree,” was not, justified

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the court in giving an instruction based upon them, and were sufficient to sustain a finding by the jury to that effect.

As to the second objection to the instruction: There is little difficulty in construing the meaning of the call of the controverted line in the title bond and deed—certainly it is not so vague and indefinite as would justify a court in rejecting it. The other objection we think equally without merit. The evidence, if the jury had been permitted to consider it, was not sufficient to have justified them in finding that the defendants had acquired title to the land in controversy, or any part of it, by adversary possession, or to have authorized the presumption of a conveyance to the predecessors in title, under whom the defendants claim, prior to the conveyance of Warder, under which the plaintiff claims.

Instruction No. 2, given by the court of its own motion, is as follows: "The Court instructs the jury that if they believe from the evidence that the white oak tree known in the proof as the Aston tree is the tree referred to in the original writings between Warder and the Robersons, and if they further believe that the line run from the beginning corner a straight course through said tree will not reach the Isom Hall line, then the degree of said line must be changed so as to run from said Aston tree to a point on the Isom Hall line so as to run to the corner marked on the map, 'W. O. and B. O. Gone,' and they shall find for the plaintiff so much of the land in controversy, if any, as may be included within the line so run."

The objections urged to that instruction are, "that it compelled the jury, if they found the Aston tree to be the true tree, to find a single arbitrary line to a single arbitrary point so as to include *lines* in the plural, whereas the court should either have told the jury that the call from the Aston tree was too indefinite to be located, or at most that it could only be located by running a straight line from the white oak to a point where the Isom Hall line would cross Indian Creek."

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The objection that the call was too indefinite to locate was considered in disposing of the objections to instruction No. 1 adversely to the defendants' contention, and need not be further noticed.

As to the other objection: Where the call is for running to the line of another survey, generally course must yield, and the line be so run as to reach the line of the survey called for at such point, if no object be named in the deed, as will least change the course and be most in accord with the next call of the conveyance. As the calls in question were for running to *Hall's line and with his lines to Indian Creek*, to have run the line to the point where Hall's line crosses Indian Creek, as suggested by the defendants, would have entirely ignored the call for running with Hall's lines. In construing a conveyance, or in applying it to its subject matter, effect should be given, as far as possible, to all of its provisions. We do not think that the defendants were prejudiced by the instruction complained of.

We are of opinion that the judgment of the circuit court should be affirmed.

*Affirmed.*

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Opinion.

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**Staunton.**

## STRICKLAND v. FAIRFAX.

September 9, 1909.

Absent, Keith, P. .

1. **BROKERS—Right to Compensation—Completion of Service—Agreement Not to Charge.**—A broker's right to compensation attaches only when he has completed his services, and not till then. If he is employed to effect a lease, and afterwards, before the lease is effected or he has done all that it was his duty to do, he agrees with the owner that he will make no charge for his services, there can be no recovery by him for his services. He cannot recover for subsequent services because he agreed not to charge for them, and he cannot recover for prior services because his services were not completed, and his right to compensation depended upon a full performance of his duty as broker.

Error to a judgment of the Corporation Court of the city of Roanoke in an action of *assumpsit*. Judgment for the plaintiff. Defendant assigns error.

*Reversed.*

The opinion states the case.

*Dupuy & Whittle and Hart & Hart*, for the plaintiff in error.

*C. A. McHugh and Robertson, Hall, Woods & Jackson*, for the defendant in error.

BUCHANAN, J., delivered the opinion of the court.

R. R. Fairfax, a real estate broker doing business in the city of Roanoke, instituted an action of *assumpsit* to recover

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compensation for services rendered in leasing to Kress & Co. certain real estate owned by J. T. Strickland.

Fairfax introduced evidence which tended to prove that he had entered into an agreement with Strickland, as a real estate broker, to effect the lease of certain property, and was to receive for his services the usual commissions received for like services in that city; that he did effect a lease of the property to Kress & Co.; and that the usual compensation for like services in that city was two and one-half *per cent.* on the aggregate amount of the rent to be received by the landowner. Strickland, on the other hand, denied that he had made any such agreement. He introduced evidence tending to prove that after Fairfax had interviewed him on two or three occasions in reference to the sale or lease of the property, he came to him again and said that he was in correspondence with Kress & Co. in reference to the property, and would like to have them located on Strickland's corner; that he (Strickland) then inquired of Fairfax what he would expect for his services if the property was leased to them, and his reply was that he would not charge him anything, as he expected to get some options on ground near by, and would come out all right; and with that understanding the lease was afterwards made to Kress & Co.; that Fairfax requested him the night the contract of lease was signed, and afterwards, not to say anything about it until he could secure certain options; that he delayed making public the lease for a week or ten days, and that Fairfax secured at least one option on adjoining property out of which he made two hundred dollars.

In submitting the case to the jury, Fairfax asked for three instructions. By the first the jury were told that the burden was on the plaintiff to show that he had performed the services alleged in the declaration, and that he had authority to perform them; and that the burden was on the defendant to prove any matter of defense. To this instruction there was no objection.

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The other two instructions, as amended and given by the court, were as follows:

2. "The court instructs the jury that if they believe from the evidence that, after the plaintiff had rendered services to the defendant in securing a tenant for him, which services were accepted by the defendant, the plaintiff promised or agreed not to make any charge for such services, in order for such promise or agreement to be binding on the plaintiff, it must have been supported by a consideration, and if the promise or agreement was made without consideration, the plaintiff may recover the reasonable value of his services rendered up to that time under the contract and for which he was entitled to receive pay."

3. "The court instructs the jury that if they believe from the evidence that the plaintiff rendered services to the defendant in securing Kress & Co. as tenant for his building, and that there was no agreement between plaintiff and defendant as to the amount of compensation, and that the defendant accepted such services rendered by the plaintiff and received a benefit therefrom, then the plaintiff is entitled to recover the reasonable value of the services rendered by him in connection with the procuring the contract of lease, except if the jury believes from the evidence that the plaintiff told the defendant he would make no charge for his services, then he is not entitled to recover for any services subsequently rendered."

The action of the court in giving these two instructions, which were objected to in the trial court, is assigned as error.

Neither of the instructions, as it seems to us, were applicable to the case. If the jury believed that the evidence sustained the plaintiff's claim—that he had rendered the services under the express agreement testified to by him—then he was entitled to recover for effecting the lease the usual commissions paid for like services in the city of Roanoke. If, on the contrary, they believed that the evidence sustained the defendant's contention—that he had made no contract with the plaintiff to lease

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his property prior to the conversation in which the plaintiff told the defendant that he did not make any charge for his services—then the plaintiff was not entitled to recover anything. He was not entitled to recover for services rendered subsequently, because he had stated that he would not charge for them; he was not entitled to recover for services rendered prior to that time, since they were rendered as a mere volunteer. Clark & Skyles on Law of Agency, sec. 769.

If the jury believed that the plaintiff had been employed as a broker to effect a lease of the property, and that afterwards, before the lease was effected or the broker had done all that it was his duty to do, he had agreed with the defendant that he would not charge him for his services, there could be no recovery. He could not recover for subsequent services, because he had agreed not to charge for them; he could not recover for prior services, since his right to compensation under the express agreement testified to by him, as well as under the general law applicable to brokers, depended upon a full performance of his duty as broker.

It is well settled that a broker's right to compensation attaches only when he has completed his services, and not till then. See *Crockett v. Grayson*, 98 Va. 354, 357, 36 S. E. 477, and cases there cited; 2 Clark & Skyles on Law of Agency, secs. 770, 771; 19 Cyc. 240.

It is not pretended that, at the time the defendant testifies plaintiff informed him that he would not charge him for his services, the lease had been made, or that the plaintiff had done all that was required of him in effecting the lease. Since the plaintiff had no right to compensation for services rendered under the express agreement until the services were performed under it, he could not abandon that agreement before he had performed his contract and agree not to charge for his services in making the lease, and then recover for what he had done prior to his abandonment.



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For the error in giving the instructions objected to, the judgment must be reversed, the verdict set aside, and the cause remanded for a new trial to be had not in conflict with the views expressed in this opinion.

*Reversed.*

Opinion.

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**Staunton.**

THOMAS, ANDREWS & Co. v. TOWN OF NORTON.

September 9, 1909.

1. **INJUNCTION—Illegal Tax—Voluntary Payment—Moot Questions—Dismissal—Jurisdiction.**—Upon a pure bill of injunction to enjoin the collection of a tax, the voluntary payment of the tax pending the proceeding and before a final decree destroys the whole ground for the equitable relief prayed, and puts an end to the case. There is nothing left to support the proceeding, and the preliminary injunction granted on the filing of the bill should be dissolved, and the bill dismissed without prejudice. It is immaterial that the parties agree that the suit shall go on to final decree, and that if decided in favor of the taxpayer the officer will refund. Consent does not confer jurisdiction in such a case, and courts will not decide purely moot questions. Whenever there is no actual controversy involving real and substantial rights between the parties to the record the case will be dismissed.

Appeal from a decree of the Circuit Court of Wise county.  
Decree for defendant. Complainants appeal.

*Amended and Affirmed.*

The opinion states the case.

*Bond & Bruce*, for the appellants.

*C. H. Patteson and Bullitt & Chalkley*, for the appellee.

HARRISON, J., delivered the opinion of the court.

In this case the appellant obtained a temporary injunction, enjoining the appellee from the collection of a certain tax al-

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leged to have been illegally assessed against it. At the final hearing of the cause the temporary injunction was dissolved and the bill dismissed.

The tax, the collection of which was sought to be perpetually enjoined, was voluntarily paid by the appellant pending the proceedings in the lower court, and before the final decree. The only reason assigned for continuing the prosecution of this proceeding for a permanent injunction after the payment of the tax was that the appellee had agreed to refund the tax paid by the appellant if the suit should be decided in favor of the latter.

“When an appeal is taken from an order dissolving or denying a preliminary injunction or dismissing the bill, and, pending the appeal, the act sought to be restrained has been accomplished, that fact, upon being brought to the attention of the reviewing court by motion supported by affidavit, affords sufficient ground for dismissing the appeal, the dismissal being without prejudice. . . . So, upon an appeal from a decree dismissing a bill brought to enjoin the collection of taxes, the payment of such taxes pending the appeal affords good reason for dismissing the appeal.” High on Injunctions (4th ed.), sec. 1701-a.

If the payment of taxes sought to be enjoined after an appeal is taken necessitates the dismissal of the appeal, so, for the same if not greater reason, the payment of taxes before a final decree in the lower court necessitates the dissolution of the injunction and dismissal of the bill by that court.

It is well settled that where there is no actual controversy, involving real and substantial rights, between the parties to the record, the case will be dismissed.

“The voluntary payment of a municipal tax while a suit is pending in this court between the party taxed and the officers of the corporation, to determine whether it was legally assessed, leaves no existing cause of action, and requires the dismissal

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of the writ of error." *Little v. Bowers*, 134 U. S. 547, 33 L. Ed. 1016, 10 Sup. Ct. 620.

In the case cited, in answer to the contention that the case had been selected from a number of others as a test case, and that it was the understanding between the parties that the case should proceed to a final hearing before the Supreme Court, it was said: "Nor is it material that the case was selected by the plaintiff in error and agreed to by the defendant in error before the writ of error was prosecuted, as one in which the question of taxation under the New Jersey statutes could be fully considered and finally decided by this court; for it is well understood that consent does not confer jurisdiction."

In *San Mateo County v. Southern Pacific Ry. Co.*, 116 U. S. 138, 29 L. Ed. 589, 6 Sup. Ct. 317, a writ of error was dismissed when it appeared that taxes assessed against the company had been paid to the county after the suit had been commenced; the court resting its judgment upon the reason that there was no longer an existing cause of action in favor of the county against the railroad company.

In the case of *Tomboy Gold Mine Co. v. Brown* (C. C. A.), 74 Fed. 12, where a motion was made to dismiss the appeal upon the ground that the appellant had, since taking the appeal, paid the taxes, the collection of which the bill sought to enjoin, the court said: "The motion to dismiss must be sustained. It is well settled that the payment, whether voluntary or compulsory, of a tax, to prevent the payment of which a bill in equity has been filed, leaves no issue for the court of equity to pass on. The equitable ground, whatever it may have been, for the relief prayed, ceased upon the payment of the tax."

In *Singer Manufacturing Co. v. Wright*, 141 U. S., 35 L. Ed. 506, 12 Sup. Ct. 103, the court said: "We are relieved from a consideration of the interesting questions presented as to the validity of the legislation of Georgia levying a license

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tax upon dealers in sewing machines. . . . The taxes being paid, the further prosecution of this suit to enjoin their collection would present only a moot question, upon which we have neither the right nor the inclination to express an opinion.

. . . The payment of the taxes was, it is true, made under protest, the complainant declaring at the time that they were illegal, and that it was not liable for them; that the payment was made under compulsion of the writs; and that it was intended to demand, sue for, and recover back the amounts paid. If this enforced collection and protest were sufficient to preserve to the complainant the right to proceed for the restitution of the money, upon proof of the illegality of the taxes, such redress must be sought in an action at law. It does not continue in existence the equitable remedy by injunction which was sought in the present suit. The equitable ground for the relief prayed ceased with the payment of the taxes."

The case at bar is a pure bill of injunction, having no other purpose than to enjoin the collection of the tax in question. When, pending the proceeding and before final decree, the complainant voluntarily paid the tax it was seeking to enjoin, the whole ground for the equitable relief prayed ceased. There was nothing left to support the proceeding. It would have been a moot question to have then decided upon the legality of the tax, for if the court had held that the tax was illegal, it could not have entered a decree restraining the collection of a tax that was already paid. In the light of reason and authority, there was nothing to do under such circumstances but to dissolve the temporary injunction and dismiss the bill. The dismissal, however, should have been without prejudice, and in this respect the decree appealed from will be amended, and thus modified it will be affirmed.

*Amended and affirmed.*

Statement.

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**Staunton.**

TILLER, TREASURER, v. EXCELSIOR COAL AND LUMBER CORPORATION.

September 9, 1909.

1. TAXATION—*Delinquent Taxes—Sale of One Tract for Taxes on Another.*—It is not permissible for a treasurer to sell the mineral lands of an owner, which are not delinquent, to pay delinquent taxes on other lands held in fee by the same owner.
2. EQUITY—*Injunction Against Illegal Tax—Complete Relief.*—The jurisdiction of a court of equity to enjoin the collection of an illegal tax is well settled in this State, and, having acquired jurisdiction for this purpose, it is proper for the court to settle fully the rights of the parties with respect to the entire subject matter of the litigation.
3. TAXATION—*Date of Assessment of Lands—February 1—Construction of Statutes.*—The revenue system of the State must be considered as a whole, and the various sections of the statutes which are in *pari materia* must be read together in order to ascertain their true meaning and intent. So reading chapter 24 of the Code, it appears that the beginning of the tax year for the assessment of taxes on real estate is February 1, and that the person who owns land on that date is the one to whom the land is to be assessed for taxes for the year thence next ensuing.

Appeal from a decree of the Circuit Court of Dickenson county. Decree for complainants. Defendant appeals.

*Affirmed.*

The opinion states the case.

*Ira Vanover and Roland E. Chase*, for the appellant.

*Finney & Wilson*, for the appellee.

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**Opinion.**

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WHITTLE, J., delivered the opinion of the court.

On January 1, 1906, the appellee, the Excelsior Coal and Lumber Corporation, owned 14,344 acres of land in fee, and 9,050 acres of coal and mineral, in Dickenson county, Virginia. The commissioner of the revenue assessed the appellee with taxes on the first-named tract, and also on 6,316 acres of coal and mineral, instead of 9,050 acres, the correct acreage owned by the corporation, for the year 1906.

On July 16, 1907, the appellee obtained from the Circuit Court of Dickenson county orders exonerating it from payment of taxes and levies for the year 1906 on 6,851 acres of land in fee, being part of the 14,344 acres; and on March 17, 1908, it was exonerated from all taxes and levies assessed upon the 14,344 acres in fee for the year 1906, it appearing that it had sold and conveyed the land to the Yellow Popular Lumber Company on January 5 of that year. The appellant refused to respect the orders of March 17, 1908, on the ground that the circuit court had exhausted its jurisdiction under the statute after making the exonerating orders of July 16, 1907, and that the subsequent orders were, therefore, void.

The treasurer was proceeding to advertise appellee's mineral land for sale for delinquent taxes for the year 1906, on the land in fee, when enjoined by an order of the circuit court.

At the final hearing, the court held the assessment of taxes for 1906 on the land in fee against the appellee illegal, as it was not the owner thereof on February 1, and, having corrected the discrepancy in acreage of the coal and mineral land, perpetuated the injunction with costs.

Independently of the question of the validity of the exonerating orders of March 17, 1908, with respect to which we express no opinion, it was clearly not permissible for the treasurer to sell appellee's mineral lands, which were not delinquent, for delinquent taxes on the 14,344 acres in fee.

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The Virginia Code, 1904, section 437a, provides that where the surface of land is held by one person and the minerals by another, the commissioner shall ascertain the fair market value of their respective interests. In other words, the two holdings are made distinct and separate subjects of taxation.

The jurisdiction of a court of equity to enjoin the collection of an illegal tax is well recognized in this State (*Town of Wytheville v. Johnson*, 108 Va. 589, 62 S. E. 328, 18 L. R. A. (N. S.) 960), and it was proper for the circuit court, after having acquired jurisdiction of the case, to settle fully the rights of the parties with respect to the entire subject matter of the litigation.

We are also of opinion that the circuit court did not err in holding that the assessment of taxes against the appellee for the year 1906, upon the 14,344 acres of land in fee, was unlawful, for the reason that it did not own the land in fee on the first day of February of that year.

By Act of the General Assembly, approved April 16, 1903 (Acts 1902-3-4, p. 155), it is declared: "That the taxes on persons, property and incomes for the year commencing the first day of February, 1903, and each year thereafter, and on licenses to transact business, shall be as follows: . . ."

So, also, section 455 of the Code provides that: "The commissioner for each district . . . shall commence, annually, on the first day of February, or at such time as the auditor shall designate, and proceed without delay to ascertain all the real estate in his district . . . and the person to whom the same is chargeable with taxes on that day."

This regulation with regard to the beginning of the tax year has long been incorporated in the statute law of this Commonwealth. Thus, the act approved March 16, 1874 (Acts 1874-5, p. 215), making general provision for the assessment of taxes, prescribes that such taxes shall be assessed for the year beginning the first day of February.



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Our attention has been called to section 459 and 461 of the Code, the former requiring the clerk of every circuit and city court, annually, on or before the fifteenth day of January, to make out a list of all deeds for the partition or conveyance of land . . . which have been admitted to record in the clerk's office of such court within a year ending on December 31, next preceding; and the latter directing such list to be sent to the Auditor and a copy to be delivered to the commissioner.

It is said that section 455 could not have intended to devolve upon the commissioner the duty, in the meantime, of searching the records for conveyances and grants made between January 1 and February 1; and, consequently, that land so conveyed and granted would escape taxation for that year altogether.

It is true the conveyance from the Excelsior Coal and Lumber Corporation in this case would not appear in the list of January 15, 1906, but in the list for the following year; and that it might not be practicable for the commissioner to make search for conveyances and grants made between the dates mentioned. Yet it does not follow from those circumstances that the land would escape taxation for the year in question. On the contrary, that result would not follow when sections 455, 458, 459, 461 and 470, which are *in pari materia*, are read together.

Section 455 makes it the duty of the commissioner to ascertain the real estate in his district and the person to whom the same is chargeable with taxes on February 1 of each year; and, in the discharge of that duty, he is directed by section 458, when taking the list of personal property (as prescribed by section 490), to carry with him the last land book; and the entry of lands charged to any person resident, or having an agent within his district, shall be shown to such person or his agent, who shall state on oath whether the same be correctly

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entered, whether any part thereof ought to be transferred to any other person, and, if so, to whom, and the nature of the evidence to authorize such transfer. The commissioner, upon obtaining such information, shall verify the same by the records, and, if found correct, he shall change the entries on his land book accordingly. This section, if complied with, prevents the ill consequences suggested, and makes the owner of land on February 1, which has been conveyed between the end of the calendar year and the beginning of the tax year, answerable for the tax.

Sections 459 and 461, as we have seen, deal with the duty of clerks to make out annually lists of deeds, and to transmit such lists to the auditor and deliver copies to the commissioners, who are required to make the transfers on the land books contemplated by section 470.

The revenue system must be considered as a whole, and our interpretation of the foregoing sections of chapter 24 of the Code has obtained in the auditor's office for many years; and, as was said in *Pardee v. Commonwealth*, 102 Va. 905, 908, 47 S. E. 1010, 1011, "a departure from that rule can only result in confusion and inconvenience."

For these reasons we are of opinion that the decree appealed from is right and should be affirmed.

*Affirmed.*

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**Syllabus.**

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**Staunton.****VIRGINIA IRON COAL AND COKE CO. v. MUNSEY.**

September 9, 1909.

1. DEMURRER TO EVIDENCE—*Verbal Joinder—Amendment.*—The refusal to permit a demurrant to the evidence to amend his grounds of demurrer after a verbal joinder in the demurrer has been announced by the demurree is not prejudicial to the demurrant where, under the grounds already assigned, he has the right to rely upon, and does in fact argue the same point proposed to be made and relied on by the amendment.
2. DEMURRER TO EVIDENCE—*When It Should Be Overruled.*—If, upon a demurrer to the evidence, the evidence is such that the jury might have found a verdict for the demurree, the court must so find and grant judgment in his favor. Furthermore, if reasonably fair-minded men might differ upon a question, such question must be decided against the demurrant on a demurrer to the evidence.
3. MASTER AND SERVANT—*“Bank Boss”—Vice-Principal.*—A “bank boss,” when inspecting a mine to ascertain if it is a safe place for miners to work in, is discharging a non-assignable duty of the master, and is a vice-principal, and not a fellow-servant of such miners.
4. DEMURRER TO EVIDENCE—*Positive Evidence of Demurree.*—Upon a demurrer to the evidence, the positive evidence of the demurree that he did not have knowledge of a danger confronting him must be accepted as true.
5. MASTER AND SERVANT—*Safe Place—Assumption of Risk.*—Where a miner has reported to the “bank boss” the unsafe condition of the mine, and the latter inspects the mine and professes to have made the mine safe, and tells the miner that he can safely return to work in the mine, the miner has the right to rely upon such assurance, and if he does rely upon it and returns to work in the mine he does not assume the risk of working therein.
6. MASTER AND SERVANT—*Safe Place—Duty of Servant—Case at Bar.*—While it is as much the duty of the servant to provide for his own safety from such dangers as are known to him, or as are discernible by ordinary care on his part, as it is the duty of the

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master to provide for him, yet, in the case at bar, it was the duty of the master to have provided against the accident which caused the injury to the servant, and the evidence fails to show that the servant neglected any duty which devolved upon him. The servant was injured by a rock falling on him from the roof of a mine, and the evidence is clear that the danger was known to the master, and that it was his duty to have propped the rock that fell upon the servant before sending him in the mine to work. The danger was a continuing one, and the place was not rendered unsafe by any act on the part of the servant.

Error to a judgment of the Circuit Court of Wise county in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

*Affirmed.*

The opinion states the case.

*W. H. Price, Jr., and Bullitt & Chalkley*, for the plaintiff in error.

*Ayers & Fulton and B. H. Sewell*, for the defendant in error.

CARDWELL, J., delivered the opinion of the court.

This action was brought by Marion A. Munsey, to recover of the Virginia Iron, Coal and Coke Company damages for injuries sustained by Munsey because of the negligence of the defendant company.

The evidence having gone to the jury, the defendant demurred thereto, which demurrer was overruled, and judgment entered in favor of the plaintiff for the amount of damages ascertained by the jury, subject to the ruling of the court upon the demurrer to the evidence; and to that judgment this writ of error was awarded.

There are three grounds of error assigned in the petition for the writ of error. The first is to the ruling of the court on the demurrer to the declaration and to each count thereof; the second, to the overruling of the demurrer to the evidence

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and entering judgment against the defendant; and the third, the refusal of the court to allow the defendant to amend its demurrer to the evidence and to assign an additional or seventh ground therefor.

No reason is given or authority cited to show why the declaration does not fully measure up to the requirements of a declaration in such a case, and we do not deem it necessary to discuss this assignment further.

The defendant filed six grounds of demurrer to the evidence, and after a verbal joinder in the demurrer had been announced by the plaintiff, and after his witnesses and the jury had been discharged, the defendant asked leave to add the additional ground of demurrer, which presented the question, whether or not, if any of the servants of the defendant were guilty of negligence which was the proximate cause of the injury complained of, such servants were fellow servants of the plaintiff.

As practically conceded by the learned counsel for the defendant company, the refusal of the court to allow the said amendment to the grounds of demurrer was not prejudicial to the defendant company, because it had the right to and did argue in its petition for this writ of error the point proposed to be made and relied on by the amendment. In other words, if as a matter of right the defendant was entitled, under the circumstances stated, to add an additional ground of demurrer to the evidence, the point proposed to be made by the additional assignment was proper to be made, and doubtless was made, in the court below, as well as in this court, under the other grounds of demurrer filed in accordance with the statute. Acts 1906, p. 301.

This leaves for determination the sole question, whether or not the circuit court erred in overruling the demurrer to the evidence, and in entering judgment thereon in favor of the plaintiff, Munsey.

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Munsey, aged about 30 years, inexperienced in mining coal, was employed by the defendant company in the fall of 1906 and put to work in the latter's mine, known as the "Sexton" mine, in Wise county, and, after working there about three and one-half months, he received the injuries of which he complains.

He had first worked about one and a half months in Room No. 9, on "Caney Entry," to the mine, and then, by order of a "cut boss" in that part of the mine, he went to work in Room No. 8, where he worked until about the 10th of January, 1907. The top, i. e., the roof, of the mine was bad generally and regarded as dangerous. By reason of this dangerous condition Munsey quit work in Room No. 9, and by the direction of the "cut boss" went to work in Room No. 8, the top of which room was also regarded as dangerous, and for that reason, and because the room was up next to the water the defendant company wanted to get at, the miners therein were paid 95 cents per car for the coal mined and sent out, instead of 85 cents per car paid in the other rooms of the mine.

On January 10, 1907, the top of Room No. 8 where he was at work had become, as Munsey considered, imminently dangerous; whereupon he applied to one B. F. Kiser, a fellow miner of considerable experience in mining coal, to come into his (Munsey's) room and advise him whether it was safe for him to continue to work therein. Kiser, upon going into Munsey's room, and after looking over it, found the top of the room in a very dangerous and unsatisfactory condition, and advised Munsey "to leave it and get out of there at once and stay out until it was put in a safe condition"; and thereupon Munsey did leave, and informed Gibson, who was the general mine foreman, as to the condition of the room where he (Munsey) had been at work, that the roof needed propping, etc., but did not tell Gibson what particular part of the roof was bad,

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or about any particular piece of slate which Kiser said he had pointed out to Munsey.

Gibson had general supervision over all of the entries to the mine, and one William Mullins was his assistant mine foreman; the latter having in charge the entry in which Munsey had been at work. Gibson did not at once go into the room which Munsey had reported to him as unsafe and make a personal examination of it, but between the time Munsey complained of the condition of the room, on the 10th, and the 14th of January, Gibson sent Will Whiteside, the foreman of the timber and slate men, into the room with instructions to do what was necessary to make the roof of the room safe. Whiteside had been employed in the "timber business" some years, and was considered experienced in his business; and pursuant to Gibson's instructions he went into Room No. 8 and, after removing some slate that had fallen up next to the face of the coal after Munsey left the room on the 10th, set three props under the slate, the closest of which was five or six feet from the face of the coal, Whiteside claiming, as he testified in this case, that it was useless to set props closer to the coal or in the hole from which a small piece of slate had fallen, or under the edge of the coal, because the slate appeared perfectly solid and there appeared no present danger therefrom, as it ran back over the face of the coal and was being held solidly by the coal, and that the slate which was sticking out was up so near the face of the coal a prop set under it would have been knocked out by the next "shooting" of the coal. In other words, unless the miner did further "shooting" there was in Whiteside's opinion no danger from the piece of slate sticking out, and if he did further "shooting" it was the miner's duty to examine the roof and see if any further propping was necessary.

On January 14, and after Whiteside had done all the propping he deemed necessary in Room No. 8, the "bank bosses," Gibson and Mullins, inspected the room, and having called

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Munsey from another room where he was then at work into Room No. 8, they assured him that it had been put into a perfectly safe condition, Gibson taking Munsey's pick and tapping on the roof to show him that the roof was safe, and directed Munsey to go back there to work, telling him that there was a "horseback" in the roof, but notwithstanding that again assuring him that the roof was safe as each end of the "horseback" rested upon the ribs of coal and would not fall. The "horseback" of which Gibson and Mullins were then speaking had not been propped, as they saw, yet they assured Munsey that he would be entirely safe in returning to his work in Room No. 8, instead of informing him of the fact, which he did not then know, that a "horseback," as the evidence plainly shows in this case, was liable to fall at any time, and "without warning."

Relying upon the representations and assurances of Gibson and Mullins as to his safety, Munsey obeyed their order and went back to work in Room No. 8 the next morning, January 15. In the forenoon of that day, he bored a hole in the usual way in the left rib of the room and made one blast, which did not in any way affect the "horseback," and on the next day, January 16, about three o'clock in the afternoon, the said rock or "horseback" fell on him, inflicting serious injuries of a permanent character, one of which was an injury to his back, and another resulting in the amputation of one of his legs above the knee.

This court has repeatedly stated the rule governing courts in considering a case where there is a demurrer to the evidence, one of its latest expressions upon that subject being found in *Milton v. N. & W. Ry. Co.*, 108 Va. 752, 763, 62 S. E. 961, where it is stated, that if upon a demurrer to the evidence, the evidence is such that the jury might have found a verdict for the demurree, the court must so find and grant judgment in his favor; and, further, that if reasonably fairminded men might differ



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upon a question, such question must be decided against the demurrant on a demurrer to the evidence.

It would seem clear from the statement above of the circumstances under which Munsey received the injuries of which he complains that, under the rule just stated governing the consideration of the evidence, it and the inferences which might have been drawn from it were quite sufficient to have warranted the jury in finding that the defendant was guilty of negligence, and that such negligence caused the injuries which the plaintiff, Munsey, sustained, without fault on his part.

Gibson and Mullins, the "bank bosses," when inspecting the roof of Room No. 8 on January 14, and when they gave Munsey assurance that he could safely return to work in that room, were discharging the non-assignable duties of the master, and were, therefore, vice-principals and not fellow-servants of Munsey. *Russell Creek Coal Co. v. Wells*, 96 Va. 416, 31 S. E. 614; *Black v. Virginia Portland Cement Co.*, 106 Va. 121, 55 S. E. 587; *Low Moor Iron Co. v. LaBianca's Admr.*, 106 Va. 83, 55 S. E. 532; *Norton Coal Co. v. Hanks*, 108 Va. 521, 62 S. E. 335.

Without attempting to review the evidence at any very great length, it clearly appears therefrom that both Gibson and Mullins knew and understood at the time that they directed Munsey to return to work in Room No. 8, that there was a "horseback" in the roof of the room, which was liable to fall at any time and without warning, a fact not known to Munsey; and further that they knew that to insure the safety of a miner working in that room it was necessary to "collar" the "horseback;" and that it was not within the power of Munsey, or any other miner working in the room, nor was it his duty, to so prop the "horseback," even if he had known of the danger of its falling.

Upon these facts and circumstances, this court would not be warranted in saying, as a matter of law, that the injuries complained of were not more naturally to be attributed to the negligence of the defendant than to any other cause.

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The contention which is made on behalf of the defendant company that Munsey himself contributed to the cause of his injuries rests solely upon some suggestions made by witnesses introduced on behalf of the defendant company that the blast set off by Munsey in the forenoon of the 15th was so much greater than was usual, it loosened the rock which fell upon him on the 16th; but this evidence utterly fails to establish the fact which was sought to be proved by its introduction, and in fact it is so plainly in conflict with the facts and circumstances which are clearly proved that it could not be considered for one moment as sufficient to have justified a jury in finding that Munsey was, on the occasion when he was injured, guilty of contributory negligence, proximately causing the accident producing his injuries.

The court is further of opinion that the contention that the evidence shows that Munsey had knowledge of the danger confronting him in Room No. 8, and assumed the risk incident thereto, is wholly without merit. This contention is predicated upon the theory that Munsey was chargeable with as much knowledge of the danger as Kiser had; but upon the demurrer to the evidence his positive statement that he did not understand it must be taken as true; and that he did not so understand the situation is corroborated by every fact and circumstance proven in the case. The "bosses," Gibson and Mullins, took charge of and pretended to inspect the "horseback" or rock which fell upon Munsey and caused the injuries to him, and their neglect to properly inspect the condition of the room and to take the necessary precautions against injury to a miner working therein was the neglect of the defendant company. Munsey had a right to rely, as he did rely, upon the assurances given by these "bosses," that he could safely work in Room No. 8, and these assurances refute absolutely any suggestion that Munsey assumed the risk of working therein.

It is very true that it is the duty of a servant to provide for his own safety from such dangers as are known to him, or

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are discernible by ordinary care on his part, and that this duty is as obligatory upon him as the duty of the master is upon the master to provide for him; but in this case there is no room to question that it was the duty of the master to have provided against the accident which caused the injury to Munsey, and the evidence utterly fails to show that Munsey neglected any duty which devolved upon him. As we have seen, as soon as he was advised of the dangerous conditions surrounding him in Room No. 8 on January 10, he informed the agent of the defendant company of the situation, and the agent, Gibson, vice-principal of the defendant company discharging a non-assignable duty of the company, took charge of the room, and Munsey never returned thereto until he had assurance that the dangers therein had been removed. *Norton Coal Co. v. Murphy*, 108 Va. 528, 62 S. E. 268, and the authorities there cited.

This is not a case where the conditions of the mine were constantly changing, as in the case of *Russell Creek Coal Co. v. Wells*, *supra*, but was a continuous dangerous condition, known to the defendant company, or should have been known by it, through its servants and agents, Gibson and Mullins; and the evidence is clear that it was the duty of the defendant company to have propped the rock that fell upon Munsey before sending him back in that room to work, and, in the absence of proof of any act on the part of Munsey rendering the place unsafe after he went back in Room No. 8, the injuries to him are attributable alone to the negligence of the defendant company.

The views above expressed make it unnecessary to consider other grounds of error assigned in the petition for this writ of error.

For the reasons stated, the judgment of the circuit court must be affirmed.

*Affirmed.*

Syllabus.

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**Staunton.**

S. H. HAWES AND OTHERS v. WM. R. TRIGG Co. AND OTHERS.

September 9, 1909.

1. **ASSIGNMENT—*Hypothecation.***—If a shipbuilding company deposits with a bank, as a security for loans, a contract with the United States government for the construction of a vessel, and executes to the bank a power of attorney authorizing the bank to collect all payments made by the government under said contract, and, on the faith of such deposit and power of attorney, the bank makes loans to said company, this transaction constitutes, under the laws of this State, a valid assignment or hypothecation of said contract with the government.
2. **ASSIGNMENTS—*Equitable Assignments.***—Words which show an intention of transferring or appropriating a chose in action to or for the use of another, if based upon a valuable consideration, will, in contemplation of a court of equity, operate as an assignment.
3. **ASSIGNMENTS—*Validity—Claims Against Federal Government—Sec. 3477 Revised Statutes.***—The object of section 3477 of the Revised Statutes of the United States, declaring void assignments of claims against the government except upon very restricted conditions, was to protect the government, and not the claimant, and to prevent frauds upon the treasury. Such transfers may be disregarded by the government, but may be made in the legitimate course of business, in good faith, to secure an honest debt. A transfer of a claim against the United States government, though not made in accordance with section 3477 of the Revised Statutes is valid, and will be enforced where the government has voluntarily paid the money due by it into a State court to be disposed of in accordance with the rights of the parties as ascertained by that court.
4. **ASSIGNMENTS—*Priority—Liens for Labor and Supplies.***—A valid assignment of a chose in action made by a manufacturing company is superior to liens for labor and supplies (under section 2485 of the Code) furnished more than two years thereafter.
5. **CONTRACTS—*Existing Laws Part of Contracts.***—The laws which subsist at the time and place of making a contract, and where it is

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to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This principle embraces alike those which affect its validity, construction, discharge and enforcement.

6. UNITED STATES—*Contracts—Construction*.—A contract between the United States government and a citizen or corporation for the building of a vessel for the use of the government or any department thereof differs in no essential features from a contract between two citizens, or between an individual citizen and a corporation. The rules of construction are the same in either case.
7. SHIPPING—*Construction of Vessel—Delivery—Passing Title*.—The right of the United States government to reject a vessel, or to annul the contract under which it was to be built, is wholly inconsistent with the idea that title had previously passed to the government, notwithstanding the fact that the contract provided for inspection by the government, payment by instalments as the work progressed, and that all parts paid for under the system of partial payments should become thereby the sole property of the United States.
8. SHIPPING—*Construction of Vessel—Government Contracts—Partial Payments—Passing Title—Supply Liens—Code, Section 2485*. Under a government contract with a manufacturing company for the construction of a vessel containing such provisions as are mentioned in the last paragraph above and providing for indemnity against loss of partial payments made, an uncompleted vessel in the hands of the company, upon which partial payments have been made, is not the property of the United States, but of the company, and is subject to the prior lien of supply creditors under section 2485 of the Code. The company could not avoid this lien, and the government cannot acquire any greater rights than the company had.
9. SHIPPING—*Construction of Vessel—Government Contract—Passing Title—Lien for Supplies—Code, Section 2485*.—If, under a contract between a manufacturing company and the government of the United States for the construction of a vessel, the government be considered as taking over the ownership of the vessel as payments therefor are made, the title passes subject to existing liens and encumbrances thereon; and if it be merely intended to provide for a lien on the vessel for money advanced in aid of its construction and equipment, whatever lien or liens the government acquires under the contract are *inferior* to the rights secured to the supply lien creditors of the manufacturing company under section 2485 of the Code.
10. CONTRACTS—*Construction—Opinion of Party—Rights of Third Persons*.—The mere opinion of the late vice-president of an in-

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solvent manufacturing company as to whether a vessel being built by his company, or any part thereof, under the contract for its construction, became the property of the party for whom it was being built, and at what time, or at what stage of its construction, is no part of the contract, and can have no weight in its construction.

11. **SHIPPING—Construction of Vessel—Inspection—Payment of Installments—Passing Title.**—The title to a vessel to be built does not pass before completion merely because the contract provides for inspection by the intended purchaser and for the payment of installments as the work progresses.
12. **SALES—Passing of Title.**—When a contract is made for the purchase of an article hereafter to be delivered and paid for, so long as any act remains to be done by the vendor in order to put it into a state of readiness for delivery, the property does not pass to the buyer, but still remains at the risk of the seller.
13. **SHIPPING—Construction of Vessel—Completion and Delivery—Passing of Title.**—If in a contract for the construction of a vessel the parties intended that certain parts of the vessel should pass to the vendee as the work progressed and was paid for, it would have been easy for them to have so provided in the contract in express terms; but where the contract contains terms and stipulations wholly inconsistent with any such an intention, the general rule of law that no property in the chattel passes to the vendee till the chattel is completed and delivered, should and must prevail.
14. **STATUTES—Joint Resolutions.**—The difference between an act of Congress and a joint resolution of the same body is that the former governs all persons under the jurisdiction of Congress, while the latter is but a rule for the guidance of the agents and servants of the government.
15. **MARITIME LIENS—Contract Lien—Lien for Supplies—Code, Section 2485.**—A lien for supplies furnished to a manufacturing company, perfected under section 2485 of the Code, and attaching to a vessel in process of building for the United States government, and before the government has acquired possession thereof, is superior to a contractual lien of the government for installments paid under a contract, reserving twenty-five *per cent.* on all payments, and requiring an indemnifying bond with good security, conditioned for the construction of the vessel according to contract, and to pay all persons supplying labor or materials in the prosecution of the work. The provisions of the contract indicate that the government contracted with reference to the statutory lien, and in subordination thereto.

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Statement.

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16. MARITIME LIENS—*Installment Payments—Collateral Security—Lien for Supplies—Priority—Code, Section 2485.*—Where the only lien which the United States government can assert to a vessel in course of construction by a manufacturing company is that of a collateral security for installment payments made during construction, such lien is inferior and subordinate to the lien given by section 2485 of the Code to persons furnishing supplies to the company for the construction of the vessel.
17. UNITED STATES—*Contracts—Laws of State—Imputed Knowledge.* When the United States government contracts with a manufacturing company in this State to build a vessel, it is charged with knowledge of the law of this State which gives to those furnishing supplies to the company a prior lien on its property not constituting a part of its plant.
18. CONTRACTS—*Construction of Parties—Statutory Rights of Creditors*—The construction placed by the parties upon a contract for the construction of a vessel by a manufacturing company cannot affect the statutory rights of the creditors of the company, as the statute necessarily enters into and forms a part of the contract.
19. SHIPPING—*Construction of Vessel—Title and Possession—Supply Liens—Demands of Creditors.*—When the title and possession of a vessel which a manufacturing company in this State is constructing for a purchaser have at all times been in the company, and were so at the time the assets of the company were placed in the hands of a receiver appointed in insolvency proceedings, the vessel is liable to the liens of persons furnishing supplies to the company, and to the demands of the general creditors of the company.

Appeal from a decree of the Chancery Court of the city of Richmond. From a decree overruling exceptions of certain creditors to a commissioner's report, the creditors appeal.

*Reversed.*

The opinion states the case.

*George Bryan*, for the First National Bank.

*Munford, Hunton, Williams & Anderson, R. G. Bickford and Floyd Hughes*, for the other appellants.

*Coke & Pickerel, L. L. Lewis, and Francis L. Smith*, for the appellees.

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KEITH, P :

The William R. Trigg Company, a manufacturing corporation organized under the laws of this State, and engaged in the construction, building and equipment of ships, boats and vessels, on June 1, 1901, executed a deed of trust to the Commercial Trust Company of Philadelphia, as trustee, covering its plant and including all its machinery, fixtures and tools, together with all corporate rights, privileges and franchises, and on June 14, 1902, another deed of trust to the Richmond Trust and Safe Deposit Company to secure large issues of its bonds. It contracted also large debts to its employees and for supplies and material; and, having become greatly embarrassed, S. H. Hawes & Co., in December, 1902, filed their bill, setting forth its default in the payment of interest upon the bonds secured by the deeds of trust, averring its heavy indebtedness to banks and individuals upon promissory notes and open accounts, its total insolvency, and praying for the appointment of a receiver to take charge of its assets and to finish certain uncompleted contracts theretofore entered into by it.

Under this bill such proceedings were had that a receiver was appointed, and the cause was referred to a commissioner to state an account showing the property of the company and its value, the debts due by it, the liens and their priorities. *Bank v. Trigg Co.*, 106 Va. 327, 56 S. E. 158.

The question now to be disposed of grows out of the following facts: The Trigg Company, appellee, on the 20th of April, 1900, contracted with the United States government for the construction of revenue cutters Nos. 7 and 8, known as the *Tuscarora* and the *Mohawk*. Certain payments were to be made as the work progressed, but not less than twenty-five *per cent.* of the contract price was to be reserved by the government until the completion and final acceptance of the vessels. The payments so reserved are known in the record as the "Reserved



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Claims.” There was no provision in the contract itself prohibiting its assignment.

The Trigg Company applied to the First National Bank of Richmond, Va., for loans to enable it to execute this contract, and received \$25,000 on April 26, 1900, filing its contract with the bank, but making at that time no written assignment. On May 11, 1900, the board of directors of the company passed a resolution authorizing the execution of a power of attorney to the bank to collect all payments under its contracts with the government for the construction of the revenue cutters. This power of attorney was duly executed on that day, and was sent by mail to the secretary of the treasury on May 12, 1900.

Other loans from the bank were negotiated by the Trigg Company upon the faith of the contracts with the United States government for the construction of the two cutters; so that the debt due to the bank was in the end represented by three notes, one of April 29, 1900, for \$5,070, subject to a credit of \$3,034 as of the 30th day of September, 1902; a note of October 16, 1900, for \$25,000, and a second note of October 16, 1900, for a like amount.

The Tuscarora was completed, accepted and paid for by the government, and makes no figure in this case. The Mohawk was completed after the appointment of the receiver; and on May 16, 1904, the sum of \$26,705.35 was paid by the government into court to the credit of this cause in full settlement of the amount due to the Trigg Company for the construction of that vessel.

In obedience to the decree of the chancery court the commissioner returned his report, from which it appears that many liens for supplies, material and labor were perfected and filed against the Mohawk. None of them are of an earlier date than December, 1902, while the First National Bank of Richmond claims under assignments none of which are later than October, 1900.

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The commissioner reported in favor of the supply and labor liens, and to that report the bank excepted, as follows:

"First. Because said commissioner finds that the assignment by said W. R. Trigg Company to said bank of its, the said Trigg Company's, claim against the United States, arising out of its contract to build for said United States the revenue cutter "Mohawk," and the power of attorney to said bank to collect the reserve held to await the completion of said cutter, are void under section 3477, Revised Statutes of the United States; and even if not so void, the general claim of said bank, as well as said assignment and power of attorney are subordinate to all liens duly acquired for labor and supplies furnished the said W. R. Trigg Company under the terms of the Virginia statute, Code of Virginia, section 2485.

"Second. Because the findings of said commissioner sustain the constitutionality of the labor and supply lien law of Virginia, whereas said law is in conflict with section 1 of Article Fourteen of the Constitution of the United States, and with the Constitution of Virginia.

"Third. Because said commissioner finds that the said W. R. Trigg Company is a 'manufacturing company' within the meaning and operation of said Virginia labor and supply lien statute, whereas he should have found that said statute did not apply to such a company."

The second and third exceptions are disposed of by the opinion of this court in *Bank v. Trigg Co.*, *supra*, where the constitutionality of section 2485 was maintained; the Trigg Company was held to be a manufacturing company, within the meaning of that section; and the liens for labor and supplies were sustained; but the decree appealed from, in that case, reserved for future consideration "all questions as to the validity or priority of any claim or lien of any party to the cause, so far as such claim or lien exists in relation to any property of the defendant corporation other than the real estate conveyed in said two mortgages and the rights appurtenant thereto, and the

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personal property forming a part of its plant . . . and all questions as to the fund or funds upon or against which the amounts herein ordered to be paid on account of labor liens or mechanics' liens established in this cause shall be eventually charged."

The precise question, therefore, now to be decided is as to the priority of right between the First National Bank, claiming under the assignments above referred to, and the subsequent liens for labor and supplies.

As we have observed, the validity of the liens was established in *Bank v. Trigg Co.*, *supra*, and must prevail, unless the bank, claiming under the assignments, shall be found to have the older and the better right.

We are of opinion that the transaction between the bank and the Trigg Company by which the contracts with the United States government were filed with the bank and a power of attorney was executed by the Trigg Company, authorizing the bank to collect all payments under its contracts with the government for the construction of the revenue cutters, on the faith of which the bank made loans to the Trigg Company, constituted under the laws of this State, valid assignments or hypothecations of those contracts. *Didier v. Patterson*, 93 Va. 534, 25 S. E. 661; *Building Association v. Coleman*, 94 Va. 433, 26 S. E. 843; *Hicks v. Roanoke Brick Co.*, 94 Va. 741, 27 S. E. 596; *Switzer v. Noffsinger*, 82 Va. 518; *Mack Mfg. Co. v. Smoot*, 102 Va. 724, 47 S. E. 859.

"Words which show an intention of transferring or appropriating a chose in action to or for the use of another, if based upon a valuable consideration, will, in contemplation of a court of equity, operate as an assignment." *Tatum v. Ballard*, 94 Va. 370, 26 S. E. 871.

We think it plain, therefore, that the dealing between the bank and the Trigg Company constituted an assignment, valid under Virginia law, and if the right of the bank is to be de-

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feated it is by virtue of section 3477 of the Revised Statutes of the United States, which is as follows:

“All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfer, assignments, and powers of attorney, must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explain the transfer, assignment, or warrant of attorney to the person acknowledging the same.”

After consideration of this statute and numerous decisions of the Supreme Court of the United States, which he discusses in his very instructive report, the commissioner in chancery was of opinion that the assignment to the bank was void, and his findings was sustained by the decree of the chancery court.

It is admitted that the assignment relied upon by the bank is not in accordance with the terms of section 3477. The contention of the bank is, that the act was passed, as its preamble states, to prevent frauds upon the treasury of the United States, and that by a proper construction it avoids all transfers and assignments of claims upon the United States at the option and election of the government of the United States; but that, in this case, the government having seen fit to deposit the amount due upon its contract with the receiver of the court, and having received a full acquittance of all claims and demands growing

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out of the contracts which were assigned to the bank, has washed its hands of the whole transaction and left the rights of the parties to be ascertained and decided in accordance with the laws of the State, unaffected by section 3477 of the Revised Statutes, the final analysis of the position of the bank being as follows: The transaction between the bank and the Trigg Company is valid as an assignment between the parties; it was made in the legitimate course of business, in good faith, to secure an honest debt, is opposed to no public policy, and is not within the mischief which was sought to be remedied by section 3477.

The language of that section, if construed literally, would annul all transfers and assignments; but the supreme court has held in numerous cases that such was not its effect. It does not apply to transfers of title by operation of law, as, for example, the passing of claims to heirs, devisees or assignees in bankruptcy (*Erwin v. U. S.*, 97 U. S. 392, 24 L. Ed. 1065), but only to voluntary assignments of demands against the government; nor does it include a voluntary assignment made by an insolvent of all his effects for the benefit of his creditors (*Goodman v. Niblack*, 102 U. S. 556, 27 L. Ed. 229); and in the latter case the court said, that a careful examination of the entire statute leaves no doubt that its sole purpose was to protect the government and not the parties to the assignment.

In *Bailey v. United States*, 109 U. S. 432, 27 L. Ed. 988, 3 Sup. Ct. 272, Mr. Justice Harlan said, that the statute in question is not to be interpreted according to the literal acceptance of the words used; and further on in the opinion says, that "A mere power of attorney given before the warrant is issued—so long at least as it is unexecuted—may undoubtedly be treated by the claimant as absolutely null and void in any contest between him and his attorney in fact. And it may be so regarded by the officers of the government whose duty it is to adjust the claim and issue a warrant for its account. But if those officers choose to make payment to the person whom the claimant, by formal power of attorney, has accredited to them

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as authorized to receive payment, the claimant cannot be permitted to make his own disregard of the statute the basis for impeaching the settlement had with his agent."

In *Price v. Forrest*, 173 U. S. 410, 43 L. Ed. 749, 19 Sup. Ct. 434, the facts were as follows: Price, a fiscal agent of the United States, advanced \$75,000 to his successor for public uses. This money not being returned, Price asserted claim against the government. In 1857 Forrest got judgment against Price, and in 1874 Forrest's widow brought suit to enforce this judgment. In 1891 Congress passed an act for the relief of Price, and in 1892 \$76,204.08 was awarded him. A portion of this money was actually paid, and Forrest's widow then obtained a decree requiring Price to deliver government drafts for the balance to a receiver. In consequence of this suit, the government officials held back enough to satisfy the judgment of Forrest against Price pending the litigation in the State courts. The State court held that it had jurisdiction under the laws of the State, and as between the parties before it, to put into the hands of its receiver any chose in action of whatever nature belonging to Price and of which he had possession or control. Upon these facts, Mr. Justice Harlan, delivering the opinion, said: "While the present case differs from any former case in its facts, we think that the principle announced in *Erwin v. United States*, and *Goodman v. Niblack* justified the conclusion reached by the State court. That court held that it had jurisdiction under the laws of the State, and as between the parties before it, to put into the hands of its receiver any chose in action of whatever nature belonging to Price and of which he had possession or control. The receiver did not obtain from Price in his lifetime an assignment of his claim against the United States. But having full jurisdiction over him the court adjudged that as between Price and the plaintiffs who sued him, the claim should not be disposed of by him to the injury of his creditors, but should be placed in the hands of the receiver subject to such disposition as the court might de-

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termine as between the parties before it and as was consistent with law. The suit in which the receiver was appointed was, of course, primarily for the purpose of securing the payment of the judgment obtained by Samuel Forrest in his lifetime against Rodman M. Price. But that fact does not distinguish the case in principle from *Goodman v. Niblack*; for the transfer in question to the receiver was the act of law, and whatever remained, whether of property or money, in his hands after satisfying the judgment and the taxes, costs, or expenses of the receivership as might be ordered by the court, would be held by him as trustee for those entitled thereto, and his duty would be to pay such balance into court to the credit of the cause, to be there disposed of according to law. . . .

“As this court has said, the object of Congress by 3477 was to protect the government, and not the claimant, and to prevent frauds upon the treasury. There was no purpose to aid those who had claims for money against the United States in disregarding the just demands of their creditors. We perceive nothing in the words or object of the statute that prevents any court of competent jurisdiction as to subject matter and parties from making such orders as may be necessary or appropriate to prevent one who has a claim for money against the government from withdrawing the proceeds of such claim from the reach of his creditors; provided, such orders do not interfere with the examination and allowance or rejection of such claim by the proper officers of the government, nor in any wise obstruct any action such officers may legally take under the statutes relating to the payment of claims against the United States. . . .

“It only remains to say touching this part of the case, that if section 3477 does not embrace the passing or transfer of claims to heirs, devisees, or assignees in bankruptcy, as held in *Erwin v. United States*, nor a voluntary assignment by a debtor of his effects for the benefit of his creditors, as held in *Goodman v. Niblack*, it is difficult to see how an order of a ju-

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dicial tribunal having jurisdiction of the parties, appointing a receiver of a claim against the government and ordering the claimant to assign it to such receiver to be held subject to the order of court for the benefit of those entitled thereto, can be regarded as prohibited by that section."

It will be observed that in *Price v. Forrest* the fund came under the control of the State court by force of its decree appointing a receiver and requiring the debtor, Price, to whom the claim from the United States Government was due, to make an assignment to the receiver; and yet that was held not to be within the mischief sought to be remedied by section 3477, that such an order would not interfere with the examination and allowance or rejection of such claim by the proper officers of the government, or in any wise obstruct any action such officers might legally take under the statutes relating to the payment of claims against the United States; *a fortiori* is the case not within the mischief sought to be remedied by section 3477 when the government, of its own accord, comes forward and by its voluntary act places within the custody of the State court the fund in controversy, receives a full acquittance of its obligations under the contract, and leaves the fund to be disposed of in accordance with the rights of the parties as ascertained by the courts of the State.

The case of *York v. Conde*, 147 N. Y. 486, 42 N. E. 193, is strikingly analogous in many of its features to the case under consideration. Witherby & Gaffney were contractors with the United States for building barracks at Sackett's Harbor. York & Starkweather furnished to the contractors lumber and material to the amount of \$3,000, to be used in the construction. During the progress of the work and before its completion in March, 1890, Witherby & Gaffney made a written assignment to York & Starkweather of \$3,000 of the money due and to become due to them from the government to be applied on their indebtedness to the assignees for materials so furnished, and authorized the disbursing agent of the government, through



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whom the payments on the contracts were made, to pay to the assignees \$500 from the next estimate thereafter, and \$2,500 on the completion of the contract and when the balance coming to the assignors should become payable to them. Witherby & Gaffney paid assignees \$5,000, but no more. On May 15, 1890, the contract having been completed, the disbursing officer delivered to Gaffney, one of the contractors, a draft for \$4,400, in payment of the amount unpaid on the contract, which he delivered on the same day to the defendants, Conde & Company, to secure them for liabilities, as indorsers and otherwise, previously incurred for the benefit of Witherby & Gaffney. The defendants, Conde & Company, before they had parted with the draft, were notified by the plaintiffs, York & Starkweather, of their claim and of the terms of the assignment to them, and they demanded that defendants pay them out of said draft the sum of \$2,500, the amount remaining unpaid to them by Witherby & Gaffney. This the defendants refused to do, and an action was brought to recover the sum. The defendants appeared and pleaded the priority of a verbal assignment, antecedent even to that of the plaintiffs; but this issue resulted in a verdict against them. They then asserted the nullity of plaintiffs' assignment under section 3477 Revised Statutes of the United States. The court, in an opinion by Chief Justice Andrews, discusses the subject at length and the authorities bearing upon it. His opinion is in part as follows:

“There are two theories of construction of the statute. One is that which gives the widest meaning to the words and which makes a transfer or assignment of a claim or interest void, not only as to the government and its officers, but as to the parties to the transfer or assignment. Upon this theory the money, when paid over to the original claimant, cannot be reached in his hands unless, after the allowance of the claim and the issuing of a warrant for its payment, the provisions of the section were complied with. This theory wholly forbids the acquisition before this has been done of any right in the fund through any

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transfer or assignment, however formal the instrument or however just and innocent the transaction. The other theory is that the objects of the statute are accomplished by a construction which makes an assignment or transfer made before the allowance of a claim void as between the claimant and the government, but leaves the transferee, after the fund has come to the hands of the claimant, to assert such legal rights against the fund and avail himself of such legal remedies to enforce them as exist in other cases of transfer. The Supreme Court has consistently maintained that a transfer or assignment made before the allowance of a claim was void at the election of the government, and that as against the assignee or transferee the government may wholly disregard it, and that payment made to the original claimant by the government is a good acquittance of the liability, although it had notice of the transfer at the time. But the court has also decided that the government may recognize such a transfer and that payment to the transferee will protect it against any subsequent claim of the original party.

“In our opinion, a just construction of the statute does not invalidate the transfer of Witherby & Gaffney to the plaintiffs, nor will the objects of the statute be defeated by the construction that such a transfer, made in the legitimate and usual course of business, in good faith, to secure an honest debt, while it may be disregarded by the government, is good as between the parties so far as to enable the transferee, after the government has paid over the money to the claimant, to enforce as against him or those who take with notice, the interest or lien given by the assignment. The fact that the government may refuse to recognize any transfer or assignment, in connection with the general principle of law which avoids all agreements contrary to public policy, will be a sufficient discouragement to illegitimate transactions, or, at all events, it is all the law can justly interpose, having due regard to the exigencies of business and the protection of innocent parties. The Supreme Court of Massachusetts, in *Jernegan v. Osborn* (155 Mass. 207, 29 N. E.

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520), reached substantially the same conclusion as that to which we have arrived.”

The Case of *York v. Conde* was carried to the Supreme Court of the United States, and the appeal was subsequently dismissed as not presenting a Federal question, (168 U. S. 642, 42 L. Ed. 611, 18 Sup. Ct. 234). The Chief Justice, referring to the opinion of the State court, said: “Many decisions of this court in respect of section 3477 were then considered, and the conclusion reached that the section had been so construed as to permit transfers made in the legitimate course of business, in good faith, to secure an honest debt, while they might be disregarded by the government, to be sustained as between the parties so far as to enable the transferees, after the government had paid over the money to its contractors, to enforce them against the latter, or those taking with notice. The court held, in effect, that such was the transaction in the case at bar, and that the transfer to York & Starkweather was simply to secure them for material actually used by the contractors in performing their contract with the government, and amounted to nothing more than the giving of security, and not to the assignment of a claim to be enforced against the government. The United States had, in due course, paid over the money to the contractors, and between them there was no dispute; nor had the United States any concern in the question as to which of the rival claimants was entitled to the fund, the proper distribution of which depended on the equities between them.”

We are of opinion that the assignment under consideration was valid between the parties and is not avoided by section 3477 of the Revised Statutes of the United States.

That assignment being valid, we are of opinion that the rights of the bank under it, which accrued not later than October, 1900, are superior to the liens for labor and supplies, none of which were obtained before December, 1902.

This branch of the case is, we think, covered by the decision of this court in *Millhiser, &c., Co. v. Gallego Mills Co.*, 101 Va.

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579, 44 S. E. 760. The hypothecation in that case was of warehouse receipts, and it was held that the due endorsement and transfer to a *bona fide* holder for value of a warehouse receipt for goods to be delivered upon order of the depositor, or upon the surrender of the receipt, "operates to transfer to the holder the legal title to such goods and the possession thereof as effectually as if there were a physical delivery of the goods to a purchaser. This doctrine rests upon principles of equitable estoppel. It is immaterial that the goods are the property of the warehouseman, or that he stores only his own goods, or that they were commingled in bulk with other goods"; that it operated by way of estoppel to transfer the title to the wheat; and that after the milling company had issued and negotiated to a *bona fide* holder for value warehouse receipts for its products, the goods represented by such receipts are not personal property of the company, within the meaning of section 2485 of the Code, so as to be liable to a lien for supplies furnished the company. In the course of the opinion Judge Cardwell says: "While it is doubtless true, as claimed in the argument for appellants, that in the enactment of the labor and supply lien statute under consideration, the legislature had in view the two-fold purpose: First, to increase the industries of the State, develop its resources, and add to its wealth and prosperity by fostering and encouraging corporate enterprises, and affording producing companies a source of credit whereby they might obtain the labor and raw material necessary to the operation of their plants, without which labor and supplies such companies would be unable to commence their operations; and, second, to guard property rights of other individuals and corporations who should be willing to furnish their supplies on credit; will it be contended that a construction of the statute which would allow a supply man to file his claim in the clerk's office after the title to property has passed to a purchaser or a lender of money to a manufacturing company, as in the case at bar, and permit the claim thus filed to reach back and take

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from the purchaser or the lender of money property that had already become his, would be in furtherance of or even consonant with the purposes of the statute? Such a construction of the statute would be disastrous to the laborer, the supply man, the manufacturer and others conducting industrial enterprises in this State alike, as doubtless many of the manufacturing plants and other industries employing labor and daily purchasing supplies would be forced to close their doors, since, it may be said as a matter of common knowledge, many of them have only a moderate capital and do business chiefly by borrowing money of banks and capitalists upon warehouse and other storage receipts representing the products of the manufacturing concern or other personal property, nor forming a part of the plant, as a basis of credit. Such receipts, as we have seen, are valid at common law as collateral for loans, and heretofore have served as a basis of credit, enabling manufacturing concerns to increase their business far beyond what they could do if left to borrow upon its credit only. It is of the highest importance, as has often been repeated by law writers and the highest courts of both England and America, to protect commercial credit, and this can only be done where commercial paper is held inviolable in the hands of *bona fide* holders. It has also often been repeated that courts should be especially careful not to throw doubt upon mercantile usages and the customs of business men."

A contrary rule would drive out of business every enterprise which was not backed by sufficient capital to meet all the demands of its current expenses as they accrued. It would make it impossible for men having a small capital successfully to engage in and conduct their business. It is essential to the existence of every mercantile, manufacturing or business enterprise to borrow money from time to time, and to do so they must be able to hypothecate as security such resources as may be under their control; and to enable them to negotiate loans to the best advantage, or to do so at all, the law must protect

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as far as possible commercial paper in the hands of *bona fide* holders, and be "careful not to throw doubt upon mercantile usages and the customs of business men."

The money received by the Trigg Company from the bank was necessary to the conduct of its business, and when received was paid out for material, supplies and labor with which to prosecute its business; and we are of opinion that from every point of view the claim of the bank is meritorious and ought to prevail; that its exception to the report of the commissioner should have been sustained; and that, in this respect, the decree appealed from is erroneous and should be reversed.

CARDWELL, J.:

A history of the insolvency proceedings against the William R. Trigg Company, a corporation engaged in the building and equipment of ships, boats and vessels at Richmond, Va., conducted in the above styled cause and leading up to the adjudications of the Chancery Court of the city of Richmond, from which this appeal is taken, has been fully stated in the cases of *Trigg Co. v. Bucyrus Co., et als.*, 104 Va. 79, 51 S. E. 174, and *Bank v. Trigg Co.*, 106 Va. 327, 56 S. E. 158, and need not be here repeated. In this connection, however, it is to be noted that in those cases, as held by the decree now under review, the William R. Trigg Company was held to be a manufacturing corporation, within the meaning of the Virginia labor and supply lien statute in force when the company was chartered and when it became insolvent; and that said statute was not void as being contrary to the Constitution of the State of Virginia or to the Constitution of the United States. These questions are, therefore, *res adjudicata* in this cause.

Following the adjudication of this court in *Bank v. Trigg Co.*, *supra*, the court below ruled upon certain exceptions taken by parties in interest to the report (No. 4) of Master Commissioner E. C. Massie of the property of the Trigg Company, its value, etc., an account of the debts due by the company, the

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liens upon its property, and the various priorities of such liens, etc.; and from the decree effectuating those rulings this appeal is taken.

Of the twenty-seven assignments of error in the petition for the appeal the last relates to a controversy between the First National Bank of Richmond, Va., and the supply lien creditors of the Trigg Company, which controversy has been determined by this court in an opinion by Keith, P., just handed down, and will, therefore, not be further considered in this opinion.

Taking up in logical sequence the remaining questions presented we come first to the controversy between the United States Government and the appellants with respect to the rights of these contestants in the property and funds under the control of the court, growing out of certain contracts under which the Trigg Company undertook to construct, and was engaged in constructing, when its property and affairs were placed in the hands and control of the receiver of the court in this cause, three vessels for the United States Government, viz., a dredge for the War Department, called the "Benyuard," a revenue cutter for the Treasury Department, called the "Mohawk," and a cruiser for the Navy Department, called the "Galveston," each being constructed under a written contract setting forth the terms and conditions upon which the work was to be done, and indicating the rights of the parties, respectively.

The price to be paid for the dredge "Benyuard" was \$275,375, in ten equal payments, to which was added \$2,180 for an electric plant to be installed thereon, the contract stipulating for title to the dredge in the government as its construction progressed, and as payments therefor should from time to time be made; and with respect to the other two vessels ("Mohawk" and "Galveston") the contract price named for the "Mohawk" was \$217,000, and for the "Galveston" \$1,027,000, to be paid in twenty equal installments as the work progressed, etc.; the contract in each case stipulating that the government should have a *lien* on the vessel and upon the *materials* "on



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hand for use in her construction," as payments should be made, the *lien* to commence with the first payment.

At the time the receiver was appointed, the government had paid a large amount on account of each of these vessels—for the "Benyuard," \$142,550.00, for the "Mohawk," \$149,437, and for the "Galveston," \$698,514.45—and there was on hand a considerable amount of material that had been accumulated and set apart to be used in the construction of the vessels. The vessels, as well as this material, were taken possession of by the receiver, as parts of the assets of the Trigg Company, although claimed by the agents of the United States Government as the property of the government, and accordingly a stipulation in regard to each of the vessels and the material assembled for their construction was filed in this cause by the Attorney of the United States for the Eastern District of Virginia, in conformity with the provisions of the statute contained in sections 3753 and 3754 of the Revised Statutes of the United States; whereupon the said vessels were, under decrees of the court, delivered to the agents of the United States Government.

The question decided by the lower court and presented on this appeal is, whether title to these several vessels was in the government or the Trigg Company, and, if in the latter, have its creditors who have sued out and caused to be recorded, in accordance with the labor and supply lien statute of the State, claims for supplies furnished the Trigg Company of date subsequent to the contracts between the United States Government and the Trigg Company above referred to, priority of right to satisfaction over the rights of the government in the said vessels?

The labor and supply lien statute, section 2485 of the Code of 1887, as amended by the act found in Acts 1891-2, p. 362, so far as concerns the controversy before us, declares: "All persons furnishing supplies to a mining or manufacturing company, necessary to the operation of the same, shall have a prior



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lien upon the personal property of such company other than that forming part of its plant, to the extent of the money due them for such supplies, and also a lien upon all the estate real and personal of such company, which said last lien, however, upon all such real and personal estate, shall be subject and inferior to any lien by deed of trust, mortgage, hypothecation, sale, or conveyance, made or executed and duly admitted to record prior to date at which said supplies are furnished.”

At the time that the validity of the supply liens of the creditors of the Trigg Company was determined by a former decree in this cause, which was afterwards sustained by this court in *Bank v. Trigg Co.*, *supra*, the property of the Trigg Company to which the liens attached had not been ascertained, but was reserved for future determination, and accordingly Master Commissioner E. C. Massie, to whom the cause had been referred, filed a report, wherein he reported that the several vessels in dispute, except the “Benyuard,” were liable to the claims of the several creditors of the Trigg Company which had been duly filed under the statute; that with respect to the “Benyuard,” if any title passed to the United States Government therein, such title was subject to the said liens, and said liens could be enforced because the United States had not acquired such possession of the “Benyuard” as protects it from the process of the court; and that with respect to the “Mohawk” and the “Galveston” the supply liens were superior to the lien reserved in the contract in favor of the United States.

Upon the hearing of the cause upon Commissioner Massie’s report, and the exceptions thereto, the court sustained the exceptions, so far as they related to the title to the vessels, holding that title thereto was in the government and not in the Trigg Company, and that the supply creditors were entitled to no lien thereon.

The first question presented is whether, under the rules of law applicable to the contract between the Trigg Company and the United States Government, the dredge “Benyuard,” at the

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time the supply lien creditors filed their respective claims under the statute, *supra*, belonged to the United States Government or to the Trigg Company?

It is apparent upon the face of the record that when this contract was entered into between the Trigg Company and the United States Government, providing for the building and equipment of the dredge "Benyuard," the Trigg Company was dependent upon the compensation it was to receive for the dredge as it progressed towards completion, and also upon its credit, in purchasing the needed materials and paying the labor to be employed in its construction and completion.

Its general provisions to be borne in mind are: All materials furnished and the work done by the Trigg Company were to be subject to rigid inspection by an inspector appointed on the part of the government, his decision to be final as to quality and quantity. If the Trigg Company should fail to begin or prosecute the work in accordance with the specifications (made part of the contract) the contract might be annulled by the government. In that case all payments were to cease, and all money or reserved percentage to be retained until the final completion and acceptance of the dredge, which was to be completed at the cost of the Trigg Company, the government to have the right to recover anything paid for such completion in excess of the original contract price of the Trigg Company, including all extra costs of inspection; and might proceed under section 3709 of the Revised Statutes of the United States to provide for the completion of the dredge by open purchase or contract, unless the time (sixteen months) for such completion should be extended, the Trigg Company, by express provision, to be responsible for and pay all liabilities incurred in the prosecution of the work for labor and material until final acceptance of and payment for the dredge.

It was further provided (section 9) that no prior inspection, payment or act was to be construed as a waiver of the right of the government to reject any defective work or material.

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By the 11th section, payments were to be made when the dredge contracted for had been delivered and accepted as set forth in paragraph 210, which is as follows: "Provided the requirements of these specifications are complied with, ten equal payments will be made, based on the reports of the inspector, the first when the hull and propelling machinery are 10 *per cent.* completed, the second when 20 *per cent.* completed, and so on, the last payment being made when the work is turned over to the United States after successful trial as required by paragraph 209. From each of these payments, except the last, 20 *per cent.* will be reserved until final payment. For computing the percentage of completion of this work it will be assumed, in the case of the twin-screw steel hull dredge described in detail above, that the cost of the hull is 72 *per cent.* of the whole, and the cost of the propelling machinery 28 *per cent.*; and a similar basis for computing payments will be adopted should an alternative proposal be accepted."

Reverting to the material specifications to be read in connected with the contract, section 199 declared that: "The purpose and spirit of these specifications are that the contractor (The Trigg Co.) is to provide and deliver a standard dredge hull and first class machinery, complete in every respect"; and section 206 provided for the full responsibility on the part of the contractor for the safety of its employees, plant and materials, and "for any damage or injury done by or to them from any source or cause." Section 209 provided for sea trials of the dredge at the expense of the contractor, and that any defects that might appear were to be remedied by the contractor, and that trials might be repeated until the dredge should be found satisfactory in all respects.

The provisions of section 211, relating to ownership, are as follows: "All parts paid for under the system of partial payments above specified shall become thereby the sole property of the United States, but this provision shall not be interpreted as relieving the contractor from the sole responsibility for

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the proper care and protection of said parts prior to the delivery of the dredge to the United States, or from any other of the provisions of these specifications.”

Section 212 provided for insurance against fire and marine risks, at the contractor's cost and in behalf of the United States, to at least the amount of each partial payment. Here we have, in this last-quoted section the usual stipulation in contracts of insurance that loss, if any, was to be payable to the parties concerned, as their interest might appear; and in this case the government was not concerned in the contemplated insurance beyond security for the partial payments it had made to the contractor on a contemplated purchase of the dredge if it was finally accepted on test that it had been completed and equipped in accordance with the terms of the contract—nothing more or less than a contemplated acquisition of title to a dredge for the use of the War Department of the government in the event that the government at a future day elected to take over the dredge as a purchaser, the ownership thereof remaining in the builder (Trigg Co.) until this final decision was made. Meantime, between the date of the contract and the contemplated final decision of the government as to whether or not it would become the owner of the dredge, it was only to be constructed from start to finish with materials to be acquired and paid for by the builder. The government sought to provide security for the partial payments of purchase money, as made from time to time, by its contract with the builder, while those furnishing materials needed in the construction and equipment of the dredge had the security provided for them by the statute in such case made and provided, viz., that they should have a *prior* lien upon the personal property of the builder to the extent of the money due them for such supplies, etc.

It having been held by this court, as we have observed, that the Trigg Company was a manufacturing company, and that its contracts were, therefore, subject to the provisions of our

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statute (section 2485 of the Code, *supra*), fixing the rights of those furnishing labor or materials to the company, what reason is there for the nullification of that statute as applied to this case? It has been well settled that every contract must be considered as made with reference to the existing laws by which its performance may be governed.

In *United States v. Quincey*, 4 Wall. 535, 18 L. Ed. 403, the opinion says: "It is also settled that the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated into its terms. This principle embraces alike those which affect its validity, construction, discharge and enforcement."

In the later case of *Walker v. Whitehead*, 16 Wall. 214, 21 L. Ed. 357, the above statement was repeated, and the opinion said: "These propositions may be considered consequent axioms in our jurisprudence."

Again, in *United States v. Bostwick*, 94 U. S. 66, 24 L. Ed. 65, the opinion by Waite, C. J., said: "The United States, when they contract with their citizens, are controlled by the same laws that govern the citizen in that behalf. All obligations which would be implied against citizens under the same circumstances will be implied against them."

The foregoing principles were fully recognized by the government as well as the Trigg Co. when the contract before us was entered into, and for the very purpose of avoiding the rights secured to labor and supply lien creditors by our labor and supply lien statute a stipulation was inserted in the contract, that the "William R. Trigg Co. should be responsible for and pay all liabilities incurred in the prosecution of the work for labor and materials." In fact, the learned counsel for the government seems to concede the soundness of the above doctrine, and further that the doctrine laid down in *Briggs v. A Light Boat*, 7 Allen (Mass.) 297, applies to this case, viz.: "If it

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(property purchased by the United States Government) is subject to liens or incumbrances, it passes *cum onere*."

This is not a case in our opinion, as is earnestly pressed upon us in the argument on behalf of the government, involving the doctrine relating to "sovereignty." Nor do the principles pronounced in *Milhisser v. Gallego Mills Co.*, 101 Va. 579, 44 S. E. 760, apply to the case, as we shall see later in this opinion.

The right to reject the dredge, or to annul the contract under which it was to be built, is wholly inconsistent with the idea that title passed. Let us suppose that the final tests stipulated for had been applied to the dredge and proved unsatisfactory, and the government, as it had clearly the right to do, refused to take over the ownership thereof, electing to look to the provisions of the contract providing indemnity against loss on account of the partial payments that it had made to the Trigg Company, would not the dredge then have been liable to liens for supplies furnished the latter, as provided by our statute? Clearly so, and we are unable to find anything in the contract or in the authorities applicable to its construction which postponed the attaching of liens in favor of supply creditors till the government finally determined not to become the owner of the dredge.

As in the case of *Clarkson v. Stevens*, 106 U. S. 56, 27 L. Ed. 139, 1 Sup. Ct. 200, the leading intent of the contract is, that the vessel in all respects was to be at the risk of the builder until, upon completion, the United States should accept it, upon final examination and certificate, as conforming in every particular with the requirements of the contract. It would seem to us unreasonable to construe this contract as a purchase and taking over the ownership of the dredge "Benyuard" by the government, for at that date neither the dredge nor any part thereof was in existence, and the provisions of the contract only intended to provide that as the same progressed in construction and was paid for it should be regarded as a colla-

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teral for the security of advancements made by the government to the builder during construction; so that, whether the government be considered as taking over the ownership of the dredge under the contract, as payments therefor were made, or merely intended to provide for a lien thereon for money advanced in aid of the construction and equipment of the dredge, the title in the first instance was transferred "subject to liens and incumbrances, and passed *cum onere*"; and in the second, whatever lien or liens the government acquired under the contract were *inferior* to the rights secured to the supply lien creditors of the Trigg Company by our statute.

The dredge formed no part of the plant of the Trigg Company, and the statute expressly makes the supply lien "prior" to any other lien, etc., on that class of property, created by hypothecation or otherwise. It is very true that this "prior lien" given by the statute to persons furnishing supplies to a manufacturing company is expressly confined to "property of such company," and cannot, therefore, be extended to property which was at the time the supplies were furnished "the sole property of the United States"; but in our view as to the rights of the respective parties to this controversy the dredge in question was not the property of the United States, but the property of the Trigg Company and subject to the lien of supply creditors and to the claims of other creditors of the Trigg Company.

If this be not the correct view, it can be readily seen how easily the salutary provisions of our labor and supply lien statute might be frittered away, especially by conveyances to or contracts with the government, and that, too, in face of the well settled doctrine that the extent of the rights of the government, like those of a private citizen, are determined by the rights of its grantor. It cannot be questioned that the supply-lien statute bound the Trigg Company as though it formed a part of the charter of the company, and disabled it from giving a lien upon, or otherwise disposing of, its property liable to the liens provided by the statute which interfered with

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the priority of such liens. Therefore the government in this case could only acquire what the Trigg Company had the authority to part with, and it could not give title to or lien upon any property it owned liable to liens in favor of its supply creditors. The Trigg Company being bound by the supply lien law, the government was bound thereby.

The contract in this case, as in *Briggs v. Light Boat, supra*, only provided for a purchase of the boat or vessel upon its completion according to specifications, and indemnity against loss of the partial payments made thereon to be effective if the party for whom it was to be built, upon the tests stipulated for being applied, should determine not to purchase the vessel, and the ownership thereof in the meantime necessarily remained in the builder. Under such a contract the authorities agree with decided unanimity that the ownership of the boat remains in the builder till taken over by the party for whom built when completed, as provided in the contract.

A contract between the United States Government and a citizen or a corporation for the building of a boat or vessel for the use of the government, or of any department thereof, differs in no essential feature from a contract between two citizens, or between an individual citizen and a corporation. The rules of construction are the same in either case, and the contract is entered into subject to the principles referred to above. To sustain these principles in this case it is not at all necessary that any lien be declared as existing on the property of the United States, but simply upon the property of the Trigg Company which the United States Government took when it acquired the "Benyuard" under the decrees of the court in this cause, with the stipulation to return or pay for the same should it transpire that the government had thus taken property to which it was not entitled.

The case of *Stanley v. Schwalby*, 147 U. S. 508-515, 37 L. Ed. 259, 13 Sup. Ct. 418, does not apply. The action in that case was to try title to a lot of land in the possession of the



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government, and all that was decided by the Supreme Court of the United States was, that the State court erred in its ruling that the United States Government could not by plea take advantage of the Texas statute of limitation.

In *Southern Pac. Co. v. United States*, 28 Court of Claims 77, the opinion says: "When the government enters into a contract, it lays down its constitutional authority, and has only the same rights and is subject to the same obligations as an individual."

The case of *Andrews v. Durant*, 11 N. Y. 35, 62 Am. Dec. 55, relied on for the government in this case, does lay down that it is competent for the parties to agree when and upon what conditions the property which is the subject of the contract shall vest in the prospective owner, and that in such a case the question is simply one of construction. The contest in that case was, however, between the creditors of a shipbuilder and his patron for whom the vessel was being built, and in construing the contract the opinion by Judge Denio held that partial payments and superintendence by the patron were not sufficient to make the title vest in him, but that the title remained in the shipbuilder, and that the unfinished vessel was subject to the claims of the creditors. See also *Williams v. Jackson*, 16 Gray (Mass.) 514.

The opinion expressed by Mr. Myers, vice-president and later the receiver of the Trigg Company in his oral testimony in this cause, over the objection of appellants, even if admissible, can have no weight in construing the contract we have under consideration, since the mere opinion of Mr. Myers as to whether a vessel being built by his company, or any part thereof, under the contract became the property of the party for whom it was being built, and at what time or at what stages of its construction, or what parts thereof, forms no part of the contract.

The contention in the court below was that the dredge "Ben-yuard" and the tugs "Mohawk" and "Galveston" passed to the government because the contract provided for an inspector and

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provided for the payment of installments as the work progressed ; but we are by the authorities brought to the conclusion that the court, in upholding that contention, violated the rule firmly established in America.

Mechem on Sales, Vol. I, sec. 755, after stating the general rule under contracts for the construction of a vessel for a given price to be that no property passes in the vessel until it be completed and delivered, says, that this general rule is not varied by any or all of the following facts: "That the price is to be paid in installments as the work progresses; that the vessel is to be built under the superintendence of an inspector employed by the purchaser; that this inspector has the power to approve or reject the materials to be used in constructing the vessel; that the vessel is insured for the benefit of the purchaser; that the contract stipulates that the materials, as and when approved, should become the property of and belong to the purchaser. In other words, the passage of title to a chattel to be constructed is a matter of intention of parties to be arrived at from the terms of the contract between them; the rule being that no property passes until completion, and that none of the above mentioned circumstances indicated an intention in the parties to vary this general rule by the contract." See also 2 Parsons on Contracts, 259, 260, where the authorities are cited and reviewed.

In *Briggs v. Light Boat, supra*, Briggs furnished lumber for certain light boats being built by one Andrews, under contract, for the United States, the contract being entire, providing for payment in full by the government upon completion and acceptance of the boats, and also providing that the government might furnish an inspector, but was not required to do so, and that the government should have the right to declare the contract forfeited in case the work should not progress or be done satisfactorily. The boats were completed and accepted by the government, and Briggs then claimed a lien for his supplies under the Massachusetts statutes, and the supreme judicial

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court of that State, in an opinion by Gray, J., reviewing all the authorities, English and American, adhered to the decision rendered upon a former appeal of the case, that a lien attached to a vessel built for the United States before the government took possession of the same. *Briggs v. Light Boats, supra*. In that case it was also held, it is true, that a lien of the character claimed by Briggs, held good upon a vessel built for the United States attaching before the government took possession of the same, could not be enforced in a State court upon proceedings commenced after the government has taken possession (and upon the fundamental principle, doubtless, that a sovereign cannot be sued without his consent), but that the rule was different in cases in which the United States is plaintiff. We are not, however, concerned as to the ruling with respect to jurisdiction in that case, as no such question arises in this case, where there is no attempt to invade the possession of the United States under a process of our State court, but the case is one in which the government has come and submitted its rights for the determination of the State court. *The Davis*, 10 Wall. 15, 19 L. Ed. 875.

It is very true also that the authorities agree that the general rule in cases like this is to be applied according as the intention of the parties may be ascertained from the contract; but we are unable to see how it can be said that it was the intention of the parties to the contract construed in this case that the dredge was to become the property of the government as its building progressed and partial payments therefor were made, free from liability to the claims of the supply creditors of the builder, when by the provisions of the contract, fairly construed, the government deferred its determination as to whether it would become the owner of the dredge until it was completed and the agreed final tests had been applied and proved satisfactory.

“When a contract is made for the purchase of an article hereafter to be delivered and paid for, so long as any act re-

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mains to be done by the vendor in order to put it in a state of readiness for delivery, the property does not pass to the buyer, but still remains at the risk of the seller." *Trigg Co. v. Bucyrus Co., supra.*

Though the government took possession of the dredge, this case, according to the express provision of the Federal statute under which the possession was obtained, is to be decided as if the possession of the Trigg Company had never been interrupted.

The case of *United States v. Snyder*, 149 U. S. 110, 37 L. Ed. 705, 13 Sup. Ct. 846, in which there was involved a lien for taxation fixed by Federal statute, does not apply here, since there is no Federal statute involved. The right of the government being contractual merely, no element of sovereignty enters into the case. See authorities cited above, and *Gilbert v. United States*, 1 Court of Claims 28, where it is said: "The rule regarding the effect to be given to a written contract when the United States are a party is the same as between man and man."

The contract in *Clarkson v. Stevens*, 106 U. S. 516, 27 L. Ed. 139, 1 Sup. Ct. 200, provided for an inspecting officer, but expressly declared that he should not pass upon the quality or fitness of the materials or workmanship, but merely as to the cost thereof. It provided that the inspector should receive and receipt for all materials on account of the Navy Department, which materials should then be distinctly marked with the letters, "U. S.," and should become the property of and belong to the United States. It further provided that Stevens should give a mortgage for the faithful performance of the contract, and final payment for the boat was only to be made after final inspection and acceptance. Upon that state of facts it was held that the United States acquired no title to the boat by its partial payment therefor; that the reservation of final payment and the requirement of a mortgage for the faithful performance of the contract were conclusive circumstances to show

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that no title was intended to be acquired by the United States upon its partial payments.

The decision in that case applies with all of its force to the contract we are now considering, for while the contractor (Trigg Co.) was not required to give a mortgage, it was required to give bond with good security in the penalty of \$60,000 for the faithful performance "of all and singular the covenants, conditions and agreements" of the contract, which contained a special provision for the prompt payment in full to all persons supplying labor and materials, and the other essential features are very similar to the provisions of the contract in *Clarkson v. Stevens*, *supra*. See also 2 Parsons on Contracts, 259-60, and the authorities there cited.

If there be terms in the contract going to show that the parties intended that certain parts of the vessel should pass to the vendee as the work progressed and was paid for, it would be easy, as the authorities hold, for the parties so to provide in the contract in express terms; but where the contract, as in this case, contains terms and stipulations wholly inconsistent, with any such intention, the general rule of law, that no property in the chattel passes to the vendee till the chattel is completed and delivered, should and must prevail. Authorities above cited, especially *Briggs v. A Light Boat*; *Williams v. Jackson*; *Elliott v. Edwards*, 35 N. J. L. 265; *Harvey v. The Schooner "Rosabelle,"* 20 Wis. 261.

"A person who makes a contract in writing for the building of a ship, to be finished and ready for sea on a day and at a place named in the contract, for a fixed price, part of which he agrees to pay while the work is in progress, in regular weekly payments, without regard to the amount of work accomplished, and the remainder when the ship is ready for sea, acquires no property in the ship before her completion, although an agent employed and paid by him to superintend the construction is, by oral permission of the builders, present every

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day while the ship is building, making suggestions and giving directions about the work." *Williams v. Jackson, supra*.

"That no title passes, ordinarily, during the progress of the work is now clear. This rule prevails in this country, contrary to the later but in conformity with the early English rule, notwithstanding that, by the terms of the contract, the purchaser was to pay and has paid a portion of the price in installments as the work progressed. It also prevails, notwithstanding the fact that the purchaser has furnished a part of the materials, and, by the weight of authority, it prevails though the purchaser not only paid the price in installments as the work progressed, but also, in person or by his agent, superintended the work of construction." 1 Mechem on Sales, sec. 755.

The title to the dredge remaining in the Trigg Company, it is liable to the demands of its creditors, and first to the supply liens of appellants, which attached before the United States acquired any possession of the dredge "Benyuard," it follows that said liens and debts may be enforced against the United States, pursuant not only to the stipulations contained in the agreement filed in this cause and under which the dredge was delivered into the possession of the government, but pursuant to the settled law applicable to the facts and circumstances of the case.

At the time that the receiver for the Trigg Company was appointed in this cause there were seven boats in process of completion at the yards of the Trigg Company, and certain materials had been set apart for use in the construction of each one of them. Of these boats the "Benyuard," the "Mohawk," and the "Galveston," were being built for the United States government, and the remaining four were being built for corporations. No two of the contracts under which these boats were being built were alike. Coming, then, next to the "Mohawk," we find that this boat was officially known as Revenue Cutter No. 8, and was built under contract with the Secretary of the Treasury of the United States. The contract

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was dated April 20, 1900, and provided that the vessel should be delivered "afloat and complete in all respects and ready for service"; that it should be "subject to inspection and approval of superintendents appointed by the Secretary of the Treasury, with full power to reject or approve any materials or articles used in said construction and at any stage of the work before final approval"; that the government might complete the vessel in case the Trigg Company failed to do so, at the cost of the latter; that insurance should be taken out for the benefit of the United States; that the government should pay for said vessel "when the same shall have been fully completed and finished and delivered as specified, and shall have been inspected by the properly authorized inspecting officers for the government, pronounced satisfactory in all respects, and the trial trip successfully made, the sum of \$217,000"; and that the trial trip shall be made at the expense of the contractors. It was then:

"Provided, that the Secretary of the Treasury may, in his discretion, make payments under this contract during the progress of the work not to exceed seventy-five (75 *per cent.*) of the value of the labor and materials actually furnished and delivered (and not paid for) at the date of any such payment;

"Provided, that a lien shall be, and hereby is, reserved to the United States upon the hull, machinery, fittings, and equipment of said vessel, and the materials on hand for use in her construction, respectively and collectively, for all moneys advanced on account thereof, and that such liens shall commence with the first payment, and shall thereupon attach to the work done and the materials furnished, and shall in like manner attach, from time to time, as the work progresses, and as further payments are made, and shall continue until the completion and acceptance of said vessel."

At the same time and as a part of this contract a bond was given by the William R. Trigg Company with the Virginia Trust Company as surety, in the penalty of \$45,000.00, con-

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ditioned for the proper construction of the vessel according to the contract and specifications, and that the Trigg Company "shall promptly make payments to all persons supplying said contractors labor and materials in the prosecution of the work."

There are but two distinctions between this case and that of the "Benyuard," viz.: first, that here the contract was made with the United States Secretary of the Treasury; and, second, the government here only undertook to acquire a lien for payments made as the completion of the vessel progressed. The contract was entered into pursuant to a joint resolution of Congress, passed on May 5, 1894, providing as follows:

"That the Secretary of the Treasury be, and he hereby is, authorized to make partial payments, from time to time, upon existing contracts and all contracts hereafter made for the construction of vessels for the Treasury Department, but not in excess of 75 *per cent.* of the amount of the value of the work already done; that the contracts hereafter made shall provide for a lien upon such vessels for all advances so made: Provided, that nothing in this joint resolution shall be construed to hereafter authorize any partial payments, except on contracts stipulating for the same, and then only in accordance with such contract stipulations."

The difference between an Act of Congress and a joint resolution is, that the former governs all persons under the jurisdiction of the enacting power, while the latter is but a rule for the guidance of the agents and servants of the sovereign. 26 Am. & Eng. Enc. L., 560, and notes.

We fully agree with the view taken by counsel for the appellants, and the master commissioner who reported the liens with their priorities, etc., existing on the Trigg Company's property when the receiver took possession thereof, that said joint resolution imposed no lien in favor of the United States upon vessels being constructed for it, but simply prescribed a rule as to how contracts should be made by the Secretary of



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the Treasury; and clearly this contract was made in accordance with the rule.

Here we have a conflict between a contractual lien in favor of the United States Government, and liens given the creditors of the Trigg Company under the laws of Virginia, the liens of these creditors having attached to the property in question before the government acquired possession of it, whatever may be the rights asserted by the government as to a lien thereon; and very clearly the contract for the building of the "Mohawk" was made with reference to the statutory lien in favor of laborers and supply creditors of the Trigg Company, for the government not only undertook to protect itself by reservations of twenty-five *per cent.* on all payments, but required the Trigg Company to furnish a bond with good security in the penalty of \$45,000, conditioned for the proper construction of the vessel according to the contract, etc., and that the Trigg Company "shall promptly make payments to all persons supplying said contractors labor and materials in the prosecution of the work."

In any view to be taken of this contract and of the joint resolution of Congress, pursuant to which the contract was entered into, the lien stipulated for is contractual only and not a statutory lien. What would have been its effect had it been a statutory lien we need not determine.

If, as the authorities we have cited in this opinion hold, the United States when contracting with a citizen contracts with reference to the laws in force within the jurisdiction where the contract is entered into, the case of *United States v. Snyder*, 149 U. S. 210, 37 L. Ed. 705, 13 Sup. Ct. 846, relied on so much by the learned attorney for the government, has no application whatever. To sustain the statutory supply liens of appellants upon the "Mohawk" does not "divest, postpone or affect" a title or lien in favor of the United States subsisting by virtue of a valid contract with the government. On the contrary, if the lien of the government, claimed as being superior to the liens of appellants, on the "Mohawk" be so declared, the

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labor and supply lien statute of the State would become practically useless in all cases in which the United States Government contracts for a lien upon property of a mining or manufacturing company doing business in this State, though the property upon which the contractual lien in favor of the government rests forms no part of the plant of such mining or manufacturing company.

That the "Mohawk" in process of building formed no part of the plant of the Trigg Company is not controverted, and instead of the statute (sec. 2485 of the Code, *supra*,) expressly subordinating a lien for supplies to *any* previous lien, deed of trust, mortgage, hypothecation, etc., as is contended for the government, it declares it to be "a lien upon all the estate, real and personal," of a mining or manufacturing company, other than that forming a part of its plant, but makes the lien inferior only as to any "lien or deed of trust or mortgage, hypothecation, sale or conveyance, made or executed and duly admitted to record prior to the date at which such supplies are furnished."

Coming now to the contract for the construction of the cruiser "Galveston," made December 14, 1899, with the Secretary of the Navy, we find that the contract called for the completion of the cruiser in accordance with the plans and specifications made a part of the contract, and for its delivery at Norfolk within thirty months. The contract, like that for the building of the "Mohawk," provided for a lien for installment payments made by the government during construction, and stipulated that when the government declared the contract forfeited by reason of the Trigg Company's failure to go forward with the work and make satisfactory progress, the lien claimed by the government should be as "collateral security for the refund of the installments paid on the contract price for the cruiser."

We have been unable to find any authority of Congress for the payment of the installments on the "Galveston" or for the taking of a lien therefor, but we do not deem this of any importance. By certain officers of the United States the con-

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tract was declared forfeited and threats made to take possession of the "Galveston" to be held as "collateral security" for the installment payments that had been made thereon, as provided in the contract; whereupon the receiver brought these facts to the attention of the court in this cause, and on June 18, 1903, a decree was entered as follows:

"That said William G. Groesbeck, Emil Theiss and W. H. Moody, Jr., and each of them, their agents, attorneys or employees, and all other persons, be, and they are hereby, enjoined and restrained from in any manner interfering with or taking possession of any property, and especially the cruiser 'Galveston' and dredge 'Benyuard,' under the control of or in the possession of Lilburn T. Myers, receiver of the court in this cause, under its orders heretofore entered, until the further orders of this court."

The "Galveston" was also released to the government upon stipulations being filed in this cause by the Hon. L. L. Lewis, United States District Attorney for the Eastern District of Virginia, as provided for in sections 3753 and 3754 of the Revised Statutes of the United States.

We do not deem it necessary to review the numerous authorities cited in the elaborate discussion by counsel as to the character of lien intended to be provided by the contract upon the "Galveston" in favor of the United States, as the provisions of the contract plainly indicate that after the declaration of forfeiture the only lien on the cruiser which the government could assert was that of a collateral security for a debt; and the fact that the 13th clause of the contract provided that in a future and uncertain event title to the cruiser might vest in the United States as "collateral security," in no wise qualified the right of property of the Trigg Company therein. The right of property in the cruiser was to remain in the Trigg Company until completion and delivery to the government, as we view the contract, and if the claim of supply lienors could not attach thereto, as provided in our labor and supply lien statute, it

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would be a dead letter in all cases where the contract is for the building of a vessel for future delivery and passage of title to the government. As remarked above, the government, in entering into these contracts with the Trigg Company, recognized that under the Virginia labor and supply lien statute liens might attach to the vessel to be built for labor performed and materials furnished the builder, and sought by a provision in the contract to guard against such liens; and in this contract for the "Galveston" its 18th clause provided for a release of liens before partial payments could be required. This provision was more than "a prudent precaution to avoid controversies." It was a plain recognition that the Virginia lien statutes governed the property of Virginia corporations within the borders of the State. But if this were not true as a matter of fact, it is, as the authorities we have cited clearly show, true as a matter of law, and the government cannot complain in this case in the face of its failure to avail itself of the provision contained in the 18th clause of the contract, for if it had insisted upon its plain right thereunder, "that no liens or rights *in rem* of any kind against said vessel . . . have been or can be acquired," the government would have protected itself and at the same time have protected appellants.

The point made, that persons furnishing supplies to a ship-building company are put upon inquiry as to whether or not the company is engaged in constructing ships for the government and must govern themselves accordingly, does not refute the just claims of supply creditors who have furnished necessary materials or supplies for the operations of the company's business, a "prior" lien for which attached under the statute upon the property of the company not forming a part of its plant. If the duty of inquiry existed at all in this or the last case considered above, in the absence of information at the proper place—the office of records—the duty was no more binding either upon the contractor or those furnishing it with necessary supplies than upon the government to take heed of the basic law

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of a corporation with which it was dealing. If the supply creditor knew that there was a contract with the government, the latter knew that to execute the contract supplies would be required, and must be held to know, at least in the contractual aspect of the lien, that it could gain no more than its grantor, the Trigg Company, could give.

In *United States v. Canal Bank*, Fed. Cas. No. 14, 715, 25 Fed. Cas. 278, the opinion says: "It has long been settled, by the solemn adjudication of the supreme court, that the United States do not possess any general right of priority or privilege over private creditors for the satisfaction of the debts due to them, founded upon any general prerogative belonging to the government in its sovereign capacity; but that all the priority or privilege which the government is at liberty to assert is or must be founded upon some statute passed by Congress in virtue of its constitutional authority. This was expressly so held in *United States v. Fisher*, 2 Cranch (6 U. S.) 358-396, 2 L. Ed. 304, and the doctrine has ever since been strictly adhered to. *U. S. v. Hoose*, 3 Cranch (7 U. S.) 73, 2 L. Ed. 370; *Prince v. Bartlett*, 8 Cranch (12 U. S.) 431, 3 L. Ed. 614; *Thellessen v. Smith*, 2 Wheat. (15 U. S.) 396, 4 L. Ed. 271; *U. S. v. Howland*, 4 Wheat. (17 U. S.) 108, 4 L. Ed. 526; *Conard v. Atlantic Ins. Co.*, 1 Pet. 441, 26 U. S. 387, 7 L. Ed. 189. It is not here as it is in England, where the sovereign is entitled, in virtue of his prerogative, to a priority over private creditors for satisfaction of debts due the crown. Com. Dig. 'Prerogative' D. 89; Id. 'Debt,' G. 8, G. 9."

See also *U. S. v. Bank of N. C.*, 6 Pet. 34, 8 L. Ed. 308; *U. S. v. Amer. Surety Co.* (C. C.), 111 Fed. 914; *U. S. v. Heaton* (C. C. A.), 128 Fed. 414; *U. S. v. Detroit L. Ins. Co.* (C. C. A.), 131 Fed. 668, 67 C. C. A. 1; *U. S. v. Amer. Surety Co.* (C. C. A.), 135 Fed. 79; *Briggs v. A Light Boat*, *supra*.

In view of the authorities cited, and for the reasons given in the discussion of the cases of the "Benyuard" and the "Mohawk," as well as this case of the "Galveston," we are of opin-

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ion that the supply liens of appellants in each of these cases are superior to any claim of right in the government to the vessels or lien thereon reserved in its said contracts, and to the claims of the general creditors of the Trigg Co., as they may be established in this cause.

On June 30, 1902, a contract was entered into by the Trigg Company with the Pennsylvania Railroad Company for the construction of two tugs, spoken of as the "Bristol" and the "Chester." The first clause of the contract provided, that the contractor (Trigg Co.) should furnish all materials, and build, finish and deliver the tugs in six months at Jersey City, New Jersey; and there follow in the contract stipulations that the railroad company should pay for the work and materials furnished, after inspection, a total sum of \$97,750, in ten partial payments as the building of the tugs progressed; that an inspector was to inspect the workmanship and all materials used, with full right to condemn or reject the same, etc.; that (8th clause) when all the work embraced in the contract was completed according to specifications, etc., releases should be furnished the railroad company by the contractor, under seal, from "all the mechanics and material men, all liens, claims and demands for materials furnished and provided and work and labor done," etc.; that the contractor would safeguard against accident, injuries, etc., to any person or property during construction, and indemnify and save harmless the railroad company therefrom, and from all fines, penalties, etc., incurred for and by reason of the violation of the ordinances of the city of Richmond, statutes of the State of Virginia or of the United States, while the tugs were in process of completion; that insurance against loss or damage by fire, etc., in favor of the railroad company, to an amount equal to that advanced by it in partial payments, should be taken out by the contractor; that satisfactory trial of the tugs, boilers, etc., should be made before acceptance by the railroad company, and the contractor "to arrange to have the said tugboats pass inspection by the

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United States inspectors at the port of New York"; the railroad company to have the right to reject the tugs upon trial or final inspection, etc.; but no clause was inserted in the contract, either attempting to reserve a lien in favor of the railroad company for its partial payments, or attempting to provide that the title to the tugs should pass to the extent of any payments made.

It is shown in proof that the railroad company paid \$60,000 prior to the appointment of the receiver in this cause, on account of the construction of these tugs, but that no releases of liens were ever asked for or furnished. At the time of the appointment of the receiver the "Bristol" was about 70 *per cent.* complete, and the "Chester" about 60 *per cent.*, and the tugs were sold in their incomplete state, bought by the railroad company at the price of \$38,100, the sale confirmed by decree of the court, and this money is the substance in dispute in this branch of the case.

For the reasons stated, and in view of the authorities cited above, we are of opinion that the title to these unfinished tugs did not, in virtue of the contract for their construction, pass to the railroad company, but remained in the contractor, the Trigg Company, subject to the supply liens matured and reported in this cause, and to the rights of other creditors of the Trigg Company; and that the purchase money received for said tugs is, therefore, liable first to the said liens.

The contract, dated July 17, 1902, between the New York, Philadelphia and Norfolk Railroad Company and the Trigg Company for the construction of a sea-going tug, known as "Hull 23, Cape Charles," contained practically the same stipulations as to materials to be furnished, etc., for the construction of the boat; for inspection and trials, acceptance or rejection by the railroad company; for partial payments of the contract price, \$68,250, as the work progressed; for protection to the railroad company against accident, etc., during construction; for insurance against loss by fire, etc.; and for



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exoneration against mechanics' or material men's liens, that were contained in the contract for the construction of the "Bristol" and "Chester" we have just considered. In other words, the contract for the construction of the boat "Cape Charles" provided that "the intention of these specifications is to cover the construction, complete and ready for service, of a tugboat of dimensions specified. No evidence was offered to show that any releases were ever required of or made by mechanics or material men, or any other creditor of the Trigg Company, of any lien, claim or demand for material furnished or work done on the said tugboat; but the proof is that, without taking any of the precautions it might have taken under the contract against liens for materials, etc., furnished the Trigg Company in the construction of the tug, the railroad company paid the sum of \$12,000 on account of the contract price, \$68,250, prior to the appointment of the receiver. It appears further that on December 17, 1903, this tugboat "Cape Charles" was sold at public auction under decree in this cause, and a sale thereof to the Burley Dry Dock Company, at the price of \$5,100 confirmed by decree of January 14, 1904, and this sum of \$5,100 for the boat, including hull, machinery and all materials assigned thereto, is the subject of dispute between appellee, New York, Philadelphia and Norfolk Railroad Company, and appellants that we are now considering.

The case presents practically the same facts as those in the case of the Pennsylvania Railroad Company for the construction of the boats "Bristol" and "Chester." We are of opinion that the said fund of \$5,100 realized from the sale of the tug "Cape Charles" is liable for the liens of appellants, matured in this cause, and to the rights of the general creditors of the Trigg Company.

The remaining controversy in the case arises out of a contract entered into by the Trigg Company on November 7, 1901, with the Standard Oil Company, of New York, "To build and deliver afloat and complete in all respects, and ready for ser-



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vice, . . . according to the plans and specifications hereto attached, a tank steamer, known as 'Hull 19, Lucas.' ” The contract price for the tank steamer was \$439,500, and was to be paid in twenty installments or partial payments as the work progressed, and nearly, if not all, the stipulations contained in the contracts we have reviewed above, as to inspection, power to reject or approve any materials used, etc., and final payment not to be made till the boat was completed and the machinery proved “satisfactory in all respects,” appear in this contract. It is true that the Standard Oil Company is frequently referred to in the contract as “owners,” and there appears greater particularity as to details of construction and equipment than in the other contracts; but it is not in any essential features different from those already disposed of in this opinion.

The hull and machinery of the “Lucas” and the materials assembled for its construction were sold under decree entered November 5, 1903, at public auction, to the Standard Oil Company for \$35,000, with the use of the Trigg Company's ship-yards for its completion, and the purchase money retained under the control of the court to “await the final decision by the court of the various questions as to title and liens raised by the pleadings.”

The Standard Oil Company claims the said sum of \$35,000 in virtue of its right to the incomplete vessel, under its contract with the Trigg Company, arguing that the intention of the parties to the contract will control the title to the unfinished vessel, and that the intention to pass the title may be strongly inferred from the supervision of the structure and partial payments at specified stages of the work; admitting, however, that these provisions in the contract are not conclusive of the intention of the parties, and that the weight of authorities in America hold that to ascertain the intention of the parties not only must those provisions be looked to, but the whole contract, together with the surrounding circumstances.

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Concede that the qualification of this admission is sound, we cannot see that it affords material aid to the appellee, Standard Oil Company, in view of all the facts and circumstances of the case. If we turn to the surrounding circumstances we find that Myers, the vice-president of the Trigg Company, wrote the agent of the Standard Oil Company, on May 23, 1902: "Please bear in mind that we have received about 80 *per cent.* of the material for this vessel ("Lucas"), and have had only one payment." This would not at all indicate that the first one of the two payments made on the contract price was regulated by the ratio of the materials furnished and work done. There is no significance whatever in the form of the orders for materials for the "Lucas," as they were made upon printed forms used generally by the Trigg Company, with a blank provided for the name of the patron, and the patron's name inserted in every case. Nor can we attach any importance to the construction put upon this contract by the parties thereto, as it is to be construed with deference to the statutory rights of the creditors of the Trigg Company necessarily entering into and forming a part of the contract.

In all of the contracts we have been considering the appellees, including the United States, were contracting with a corporation of the State of Virginia, whose powers were derived from the State, and whose limitations upon its right to sell, mortgage or hypothecate the property of the corporation, to the exclusion of the lien given thereon in favor of those furnishing labor or supplies necessary to the operation of the company's business, are fixed by statute.

In our view there never was a moment of time, from the entering into the several contracts considered in this opinion to the appointment of the receiver in this cause, when the title and possession of the vessel contracted for and all its parts was not in the Trigg Company; and, therefore, there is no escape from the conclusion that these vessels and each of them

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are liable to the liens of appellants reported in this cause and to the demands of the general creditors of the Trigg Company.

As already remarked, the decision in *Milhiser v. Gallego Mills Co.*, *supra*, has no controlling influence in the determination of the questions considered and decided in this opinion. This is not a case of a supply lien creditor, upon a claim filed in the clerk's office against a manufacturing corporation under our labor and supply lien statute, which is sought to be made to reach back and take from a purchaser or the lender of money property that had already become his; nor will the sustaining of the validity and priority of the liens of appellants impair or affect the protection to commercial credit which the law does and ought to safeguard; nor will doubt be thrown upon mercantile usages and the customs of business men.

If, as was said in the case of *Fid. Ins. Tr. & S. D. Co. v. Roanoke Iron Co.* (C. C.), 81 Fed. Rep. 439, relied on by the learned counsel for the Pennsylvania Railroad Co. in one branch of this case, the property ceased to be the property of the manufacturing company before the supplies were furnished, clearly there would be no lien under the statute for supplies; but that was not the case here. In no branch of this case did the contract with the Trigg Company pass title to or the possession of the vessel to the other party to the contract in absolute right, or as a hypothecation to secure advances made to the contractor. The vessel was in every case in an "undeliverable state," and, therefore, neither the title thereto nor the possession thereof passed from the Trigg Company before the supplies were furnished, as in the case of *Fid. Ins. Tr. & S. D. Co. v. Roanoke Iron Co.*, *supra*; and from the reason of the thing and from the words of the statute, as said in that case, the lien for supplies furnished by appellants attached to the vessel from the time the supplies were furnished.

In each of these cases the contract, in so far as it was intended to affect the rights of the Trigg Company's supply lien creditors or its general creditors, can only be regarded as

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a mere contract for the loan of money secured by lien on personal property—a chattel—and not as a sale and delivery of the chattel.

If this be not the correct view of these contracts and as to their effect upon the rights of appellants, then we repeat, that our labor and supply lien statutes are of no force or value in any case where a manufacturing company contracts to build a vessel for any individual citizen, a corporation, or the United States Government. The plain language of the statute is, “and all persons furnishing supplies to a mining or manufacturing company necessary to the operation of the same, shall have a prior lien upon the personal property of such company other than that forming part of its plant to the extent of the money due them for such supplies.” Words more apt in declaring a *prior* lien upon a certain class of the property of a mining or manufacturing company in favor of persons furnishing it necessary supplies could not have been employed, and it is not pretended that the vessels upon which appellants’ liens attached formed a part of the Trigg Company’s plant, nor is it denied that the supplies furnished were necessary to the operations of the company.

The learned counsel for appellee, Standard Oil Company, cites the case of *Sir James Laine & Sons, Lim., and Barclay & C. H. L.* (s. c.), decided November 25, 1907, and reported in the February number, 1908, of Appeal Cases, for the proposition that our supply lien statute cannot apply “to an unfinished vessel like the ‘Lucas.’ ” That decision has been carefully examined, and it is found that a similar contention was made in that case to that made here, i. e., that the Scottish Sale of Goods Act could not be held to apply to a ship in the course of construction; but that view was not sustained; and with respect to that decision we deem it only necessary to say that the opinions delivered therein, as we read them, fully sustain the views we have expressed in this opinion, rather than the contentions of appellees.

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As far as it has been possible to do so the numerous authorities cited by the learned counsel upon their briefs in these cases and in the oral arguments have been examined, but it would be impossible to review them further than has been done in an opinion of reasonable length. Suffice it to say, that in our judgment the great weight of these authorities sustain the views we have expressed; therefore, we are of opinion, upon the whole case here reviewed, that the court below erred in sustaining the exceptions of appellees to the report of Commissioner Massie finding the liens of appellants upon the several vessels or the proceeds arising from their sale to be prior to any claim of right to or lien upon said vessels asserted by appellees, or either of them; and the decree appealed from will therefore be reversed and annulled, and the cause remanded for further proceedings therein in accordance with the opinion.

BUCHANAN and HARRISON, J.J., dissenting.

We concur in the conclusion reached by the court, except so far as it holds that the supply lien creditors have a claim upon the vessel known as the "Benyuard" superior to that of the United States Government in and to that vessel.

The contract of the William R. Trigg Company with the government expressly provides that the government shall take title to the "Benyuard" as payment is made thereon; and there is, in our opinion, nothing in the contract to show any other or different intent.

We are, therefore, of opinion that on this point the decree appealed from should be affirmed.

WHITTLE, J., concurs with KEITH, P., and CALDWELL, J.

*Reversed.*

Opinion.

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**Staunton.**

THE BALTIMORE AND OHIO RAILROAD CO. v. THE COMMON-  
WEALTH OF VIRGINIA.

September 9, 1909.

1. STATE CORPORATION COMMISSION—*Lack of Parties—Railroads—Appeal.*—Where a necessary party to the proceedings in a case before the State Corporation Commission has been omitted and not served with process, the cause will be remanded to the Commission without deciding any of the questions involved, in pursuance of section 156 (f) of the Constitution, for such further proceedings as may be necessary to a proper and final decision of the matters in controversy.

Appeal from the State Corporation Commission.

*Remanded.*

This cause comes up upon an appeal from an order of the State Corporation Commission, entered January 28, 1908, and the order of May 20, 1908, imposing a fine of \$500 upon the appellant, the Baltimore and Ohio Railroad Company, for its failure to carry into effect the 6th paragraph of said order of January 28, 1908.

*H. R. Preston and Bumgardner & Bumgardner.* for the appellant.

*Wm. A. Anderson, Attorney General* and *Robert Tunstall,* for the Commonwealth.

By the Court:

The transcript of the record in this case having been seen and inspected, the court is of opinion, and doth so decide and

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declare, that the Valley Railroad Company is an independent corporate organization, whose rights and property are materially affected by the orders aforesaid, and was a necessary party to the proceedings, and as such entitled to reasonable notice and opportunity to make defense by appropriate pleadings, and to introduce evidence in its behalf, and to be heard thereon, before any order affecting its rights could be lawfully entered.

The court, therefore, in pursuance of Article 12, sec. 156 (f) of the Constitution of Virginia (without at this time passing upon any of the questions involved, except to reverse the order of May 20, 1908, imposing a fine of \$500 upon the Baltimore and Ohio Railroad Company) deems it necessary, in the interest of justice, to remand the case to the State Corporation Commission for such further proceedings to be had therein as may be necessary to a proper and final decision of the matters in controversy.

And it is so ordered.

*Remanded.*

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Opinion.

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**Staunton.**

MILLER, T. W., v. FERGUSON AND OTHERS.

September 16, 1909.

1. **PARTNERSHIP—Trust Relation—Adverse Interest.**—A relation of trust and confidence exists between partners in respect to their dealings with matters pertaining to the partnership. Hence one partner will not be allowed to make a profit on his copartners by the purchase of property of the firm, or of a claim against it.
2. **PARTNERSHIP—Purchase of Judgment of one Partner Against Another.**—Where parties are partners in but a single transaction, the purchase by one partner with his own means of a judgment against another partner which is in no wise connected with his partnership affairs, at a time when no funds have arisen out of which the latter is entitled to claim profits, is outside the scope of the partnership business, and is not forbidden by law.

Appeal from a decree of the Circuit Court of Wythe county.  
Decree for defendants. Complainant appeals.

*Affirmed.*

The opinion states the case.

*Scott & Buchanan*, for the appellant.

*Robertson, Hall, Woods & Jackson*, and *Robertson, Smith & Wingfield*, for the appellees.

WHITTLE, J., delivered the opinion of the court.

This case is before us for the second time. The original suit was brought by the appellant, Thomas W. Miller, against the appellees, Ferguson and Terry, to enforce an alleged parol agreement between the parties for the purchase of the "Miller Hill" property, in the city of Roanoke, upon the stipulations



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that Terry and Ferguson were to advance the purchase money, and the property when acquired should be divided into lots and sold, and, after defraying expenses and refunding the purchase price, with interest, the net profit arising from the sale was to be shared equally by the parties.

The circuit court dismissed the bill, but on appeal this court reversed the decree, and having established the partnership as outlined above, remanded the case with directions that unless the parties in interest could reach an agreement among themselves the circuit court should sell the property upon such terms as it might prescribe and dispose of the proceeds of sale in accordance with the views expressed in the written opinion of this court. *Miller v. Ferguson*, 107 Va. 349, 57 S. E. 649, 122 Am. St. Rep. 840.

The parties failing to agree, the land was sold, and it is admitted that the net proceeds of the sale amount approximately to \$18,000.

We shall dispose of the contention of the appellant, that he is entitled to the entire fund under the former decision of this court, by the statement that the circuit court has correctly interpreted the opinion and decree of this court in holding that Miller "was a partner in the land transaction in the bill and proceedings mentioned, and, as such, was entitled to one-third of the proceeds of the sale of the land, after defraying the expenses of obtaining the same, and refunding the purchase price thereof with interest."

The sole question which claims our attention on this appeal arises upon the petition of Ferguson and Terry, in which they seek to offset the costs awarded Miller in this court with a judgment recovered by the Fidelity Loan and Trust Company against him, and to subject his interest in the fund under the control of the court to its satisfaction.

That judgment was assigned by the Fidelity Loan and Trust Company to Ferguson and Terry on July 10, 1905, a short time before the institution of the suit by Miller against them

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to establish the partnership. Miller, in his answer to the petition, denies that the judgment is a subsisting lien, and attempts to show that prior to the assignment the judgment had been satisfied by certain transactions between himself and the secretary and treasurer of the Fidelity Loan and Trust Company.

It would serve no good purpose to trace the history of the negotiations by which Miller sought to have the judgment declared satisfied. It is sufficient to say that his efforts in that regard proved unavailing, and that the evidence shows that the judgment, subject to credits with respect to which the circuit court has directed an inquiry, constitutes a valid lien upon his property, except, of course, that the entire capital stock and plant of the Roanoke Title and Conveyance Company and the earnings therefrom (the property of Thomas W. Miller) are, by written agreement between him and the Fidelity Loan and Trust Company, made prior to the assignment of the judgment to Ferguson and Terry, to be free from any lien by reason of said judgment, or any execution thereon.

But it is insisted that even though the judgment be still unsatisfied, the confidential relations arising out of the contract of partnership forbade that Ferguson and Terry should acquire a judgment against their copartner, to be used as a set-off upon the settlement of the partnership accounts.

It is true that a relation of trust and confidence exists between partners in respect to their dealings with matters pertaining to the partnership; and it is upon that principle that where one partner buys property belonging to the firm, or where he buys a claim against the firm, he acquires it for the benefit of the partnership and can assert it against the firm only for the amount which it actually costs him.

The doctrine is thus stated in 1 Minor on Real Property, sec. 501: "It is a general principle of equity no less than of conscience that a trustee should not employ the property he holds in trust for his own private gain, but all profits accruing from

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such employment must be held to redound to the **advantage of the *cestui que trust***. Hence, if a trustee compounds a debt due from the trust fund, or buys it for less than its nominal amount, the benefit accrues, not to himself personally, but to the **fund.**"

Still, the purchase by one partner with his own means of an individual judgment against another partner, at a time when no funds had arisen out of which the latter was entitled to claim profits, is outside of the scope of the partnership business; and whatever view may be taken of such transactions from the standpoint of propriety, we know of no rule of law which forbids it.

The case of *Alexander v. Morris*, 3 Call 89, is relied on by the appellant to sustain the contrary doctrine. The points decided in that case are correctly set forth in the syllabus as follows: "A factor, indebted to his principal at the time, cannot sell the property of the principal to pay endorsements in the course of his factorage. Nor can a factor buy up the debts of his principal at an under rate, and claim credit for their nominal amount; but in such case he will only be allowed what he actually paid, although the purchase was made after the factorage had ceased and the principal had brought suit for an account."

In *Alexander v. Morris*, the factor had been guilty of a breach of trust in withholding his employer's funds for ten years, and at the close of a protracted litigation with the principal, after his liability had been fixed, a court of equity refused to permit him to "trump up claims" against his principal by purchasing outstanding bills at a heavy discount, and use them as setoffs at their face value.

As remarked, the purchase by Ferguson and Terry of the judgment in question was made with their individual means and before suit brought, or profits accrued, and had no connection whatever with the partnership, which was of an extremely limited character, involving the single transaction of buying the

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“Miller Hill” property for the purpose of subdividing it into lots and selling them at a profit.

In 30 Cyc. 459, after treating of prohibited transactions between partners, it is said: “Interests adverse to a copartner may, however, be lawfully acquired by a partner, when these are outside of the partnership affairs, for in such transactions they are in no sense confidential agents or trustees for each other.”

This principle is well sustained by authority. Story on Agency, sec. 125; *McKinzie v. Dickenson*, 43 Cal. 119; *Wheeler v. Sage*, 1 Wall. 518, 17 L. Ed. 646; *Latta v. Kilbourne*, 150 U. S. 524, 37 L. Ed. 1169, 14 Sup. Ct. 201.

For these reasons we are of opinion that there is no error in the decree complained of, and it must be affirmed.

*Affirmed.*

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Statement.

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**Stanton**

IDA M. MILLER v. FERGUSON AND OTHERS.

September 16, 1909.

1. HUSBAND AND WIFE—*Contingent Right of Dower—Purchase of Debts Against Husband.*—A married woman may lawfully sell her contingent right of dower in her husband's land and use the purchase money to acquire judgments against her husband.
2. FRAUDULENT CONVEYANCE—*Husband and Wife—Presumption—Rebuttal.*—In a contest between a wife and the creditors of her insolvent husband over property acquired during the coverture and conveyed to the wife, the presumption is that the husband furnished the consideration, and that the property is his, but this presumption may be rebutted by proof, and is rebutted when it is shown that the husband could not, or that he did not, furnish the consideration, and that it must have emanated from a source other than the husband.
3. HUSBAND AND WIFE—*Issue of Stock to Wife—Consideration.*—If it is shown that the husband furnished no valuable consideration for stock issued by a corporation to the wife, then his creditors could have suffered no injury by reason of the issuance of the stock to the wife, and even if it was erroneously or improperly done that furnishes no ground of complaint on the part of the husband's creditors.

Appeal from a decree of the Circuit Court of Wythe county in a suit in chancery in which appellant filed her petition. Decree for the defendants. Petitioner appeals.

*Reversed.*

The opinion states the case.

*Dupuy & Whittle*, for the appellant.

*Robertson, Hall, Woods & Jackson*, and *Robertson, Smith & Wingfield*, for the appellees.

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KEITH, P., delivered the opinion of the court.

From the opinion just handed down in the case of *Miller v. Ferguson, et als, ante*, p. 217, it appears that "The original suit was brought by the appellant, Thomas W. Miller, against the appellees, Ferguson and Terry, to enforce an alleged parol agreement between the parties for the purchase of the 'Miller Hill' property, in the city of Roanoke, upon the stipulations that Terry and Ferguson were to advance the purchase money, and the property when acquired should be divided into lots and sold, and, after defraying expenses and refunding the purchase price, with interest, the net profit arising from the sale was to be shared equally by the parties.

"The circuit court dismissed the bill, but on appeal this court reversed the decree, and, having established the partnership as outlined above, remanded the case with directions that unless the parties in interest could reach an agreement among themselves the circuit court should sell the property upon such terms as it might prescribe and dispose of the proceeds of sale in accordance with the views expressed in the written opinion of this court.

"The parties failing to agree, the land was sold, and it is admitted that the net proceeds of the sale amount approximately to \$18,000.

"We shall dispose of the contention of the appellant, that he is entitled to the entire fund under the former decision of this court, by the statement that the circuit court has correctly interpreted the opinion and decree of this court in holding that Miller 'was a partner in the land transaction in the bill and proceedings mentioned, and, as such, was entitled to one-third of the proceeds of the sale of the land, after defraying the expenses of obtaining the same and refunding the purchase price thereof with interest.' "

The principal question decided in that case was that Ferguson and Terry held, as assignees, a judgment recovered by the

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Fidelity Loan and Trust Company against Miller, the amount due upon which they had the right to set off against the costs awarded Miller in this court, and to subject his interest in the fund under the control of the court to the satisfaction of that judgment; and the decree of the circuit court in these respects was affirmed.

While the case was pending in the circuit court Ida Miller, the wife of Thomas W. Miller, filed her petition, in which she claimed to be the owner of two judgments against her husband, upon which executions had issued, by virtue of which she had the first lien upon the fund due Miller by Ferguson and Terry, and prayed that so much of that fund be decreed to her as might be sufficient to satisfy her demands.

Ferguson and Terry answered the petition of Ida Miller, and denied that she is the holder of the judgments claimed by her, and insisted that the supposed assignments under which she claims were a mere device for the purpose of hindering and defrauding the creditors of her husband; that at the time the judgments were assigned she and her husband were living together as husband and wife, and are still so living; that said Miller was, and still is, heavily indebted and financially embarrassed, and did not have and has not sufficient property with which to pay his debts, and was and still is insolvent. It is denied that either of said judgments constitute a lien upon the fund under the control of the court, and they especially deny that the judgments constitute a superior lien to any other liens upon the said property.

To this answer of Ferguson and Terry, so far as it was treated as a cross-petition praying affirmative relief upon their part, answer was made by Ida Miller, who denied that the judgment set up in her petition had been paid off or discharged, or that her husband had in any sense contributed to the purchase of said judgments with any means of his own. Her answer avers that as the wife of Thomas W. Miller she had a contingent dower interest in his real estate; that one G. H. P. Cole

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desired to purchase and acquire good title to a parcel of land in Roanoke city owned by Miller, and in order to perfect his title he desired to have a conveyance made to him of the land, in which she should unite; that Cole with his own means purchased from the Melrose Land Company its judgment against Miller, and had the same assigned to H. M. Darnall, trustee, in trust, first, that Cole should be entitled to the proceeds of the sale of said lot, which is situated on Pine street in said city; second, for the payment to Ballard P. Huff of a note of \$200, made by Thomas W. Miller and endorsed by James H. Campbell; and that thereafter all the rest and residue of said judgment was to be for the benefit of respondent, and in consideration of such assignment she did execute a deed surrendering and relinquishing her contingent right of dower to the land so purchased by said Cole; and that Cole has received the proceeds of the sale of the land or the land itself, and the balance of the judgment, which is set forth in her petition, is the property of respondent.

Further answering she says, that in the spring of 1906 she acquired, through George T. Ellis, and not through her husband, a one-fourth interest in the option to purchase from Ballard P. Huff and others some three hundred acres of land adjoining the city of Roanoke, and that subsequently she sold her option to said one-fourth interest to the Virginia Heights Corporation, in consideration of \$7,500 of the common stock of said company issued to her, and conveyed her one-fourth interest in said land to said corporation, in consideration of the issue to her of said stock; that the stock issued to her represented no actual money paid out by her or any of her associates for said stock; that the same was issued upon an estimated value placed upon the land in excess of its purchase price; and that soon after the organization of the company the value of the land so far increased as that she received offers in cash for her stock, which she accepted; that one Gertrude Blair acquired a judgment of the Peoples National Bank of



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Lynchburg against Thomas W. Miller, as set up in her petition, and it was agreed that if respondent would pay the sum of \$300 to said Gertrude Blair for said judgment, the same would be assigned to her; that thereupon she executed a note, dated the 3d day of March, 1906, payable to said Gertrude Blair four months after date, in the sum of \$300, and gave to said Gertrude Blair, as collateral security for its payment, a certificate for ten shares, aggregating \$1,000, of the common stock of the Virginia Heights Corporation; and thereafter respondent sold said stock and out of the proceeds thereof paid to said Gertrude Blair, on the 25th day of July, 1906, \$300 and took up the note, which she now files as an exhibit with her answer.

Upon the issues thus made evidence was taken, which resulted in the dismissal of Ida Miller's petition; and from that part of the decree of the circuit court she filed her separate petition for an appeal, which was allowed.

We have no difficulty in holding that the judgments in question were regularly obtained, have been duly kept alive by the issuance of executions, and are valid and subsisting liens in the hands of Ida Miller. Indeed, the only serious attack upon the judgments consists in the allegation that Thomas W. Miller, directly or indirectly, paid the consideration for the assignments, which ought to have been made to him, thereby extinguishing the judgments, but were in fact made to his wife, with the fraudulent purpose of hindering and delaying his creditors.

Mrs. Miller, without doubt, had a dower interest in the lot mentioned in her petition. G. H. P. Cole acquired this lot and wished to have her dower relinquished, in order to perfect his title. To that end he acquired the judgment against Thomas W. Miller, known in the record as the "Melrose" judgment, and assigned it to Darnall, upon the trust that the proceeds of the lot should go to Dr. Cole; that a note for \$200, for which Messrs. Miller and Campbell were bound to Mr. Huff, was to be paid out of the proceeds of the lot; and that the residue

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should be paid to Mrs. Miller. The title of Cole, who bought this judgment with his own money from the Melrose Land Company, cannot be questioned; and he, for reasons satisfactory to himself, assigned it to Darnall, upon certain trusts; and those trusts, so far as they were antecedent to the rights of Ida Miller, have been satisfied.

With respect to the Blair judgment, it appears that Gertrude Blair had purchased a judgment in the name of the Peoples National Bank of Lynchburg against Thomas W. Miller, which was duly assigned to her; that later on she sold this judgment to Ida Miller for \$300; that Ida Miller executed her note for this sum and gave as collateral security for its payment a certificate of \$1,000 of the common stock of the Virginia Heights Corporation, which she then owned; and that this stock was sold to one Bandy, and the note paid.

It is claimed that this stock really belonged to T. W. Miller. The history of the stock, so far as it can be gathered from the record is as follows: Certain parties conceived the idea of getting an option upon a tract of land known as "Solitude Farm," near the city of Roanoke. The price paid for the option was \$1,000, \$500 of which was furnished by Markley and the residue of \$500 by George T. Ellis. They then proceeded to organize a company, the capital stock of which was to be \$30,000, which was divided between Ellis, Markley, one M. A. Riff, and Mrs. Miller. That the stock was so issued to her is beyond doubt. It is also true that by one of those freaks of fortune which sometimes occurs in speculative enterprises, that stock became of such value that the ten shares placed as collateral for the note of \$300 to Gertrude Blair, when sold were more than sufficient to extinguish that note. The only question, therefore, is whether that stock should have been issued to Ida Miller or to her husband.

Just why it was issued to her does not clearly appear. If it had been issued to Thomas W. Miller, however, upon the facts in this case, and the *bona fides* of his title had been called

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in question, it would have been equally true that the proof before us would have been equally unsatisfactory. It appears that the Virginia Heights Corporation was not indebted to Thomas W. Miller; that he did not furnish a dollar towards its organization; that for whatever services he rendered to it he was paid in cash.

It is true that in a suit by creditors of an insolvent husband to subject to the payment of their debts property acquired during the coverture and conveyed to the wife, there is a presumption that the husband furnished the consideration, and that the property is his; yet that presumption may be rebutted by proof, and is rebutted when it is shown that the husband could not, or that he did not, furnish the consideration, and that it must have emanated from some source other than the husband, *Kinnier v. Woodson*, 94 Va. 711, 27 S. E. 457.

The proof to which we have adverted at least shows that the judgment was acquired by means other than her husband's. We have seen that he furnished no money for the formation of the corporation; and that for the services which he rendered he was duly compensated. Mrs. Miller was one of the incorporators. The stock was issued in her name, and if it is made to appear that her husband furnished no valuable consideration to the company, certainly his creditors suffered no injury by reason of the fact that the stock was issued to his wife, for if it were erroneously or improperly done, that may have been a wrong to the creditors and other stockholders of the Virginia Heights Corporation, but it furnished no ground of complaint upon the part of the creditors of Thomas W. Miller.

We are, therefore, of opinion that the decree of the circuit court, in so far as it dismissed her petition, was erroneous and must be reversed.

*Reversed.*

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Syllabus.

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**Stauton**

PENDLETON v. COMMONWEALTH.

September 16, 1909.

1. **TAXATION—Personal Taxes—Residence—Non-Residents.**—The question of personal taxation is to be determined by a person's residence and not by his citizenship, and is not affected by section 40 of the Code relating to expatriation. The State has no jurisdiction to assess a tax as a personal charge against a non-resident, nor, as a general rule, can the personalty of a non-resident be taxed unless it has an actual *situs* within the State.
2. **RESIDENT—Residence.**—The meaning of the words "resident" and "residence," as used in tax laws, depends upon no one fact or combination of circumstances, but must be determined from all the facts and circumstances taken together in each particular case.
3. **DOMICILE—Residence—Change of Domicile—How Effected—Case at Bar—Taxation.**—"Domicile" is of more extensive significance than "residence," and includes besides mere physical presence at a particular place, positive or presumptive proof of an intention to make it a permanent abiding place. To acquire a domicile in a particular place there must be a residence there and an intention to make that place one's home. If a person domiciled at one place but resident at another determines to make his place of residence his domicile, and continues to abide there with the intention to make it his home permanently, or for an indefinite period, he thereby acquires a new domicile. In the case at bar, the taxpayer's intention to change his domicile from this State to the city of Washington, D. C., was not only explicitly declared, but was followed by conduct consistent therewith and evincing his good faith, and he is therefore no longer taxable in this State.
4. **TAXATION—Bank Deposits—Non-Residents—Code, Sections 487 and 489.**—Sections 487 and 489 of the Code (1904) are only applicable to residents of this State. Under these sections money belonging to such residents, whether deposited in bank in or out of this State, is taxable here, but general deposits by non-residents of their own money in a bank of this State are not taxable here.

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Error to a judgment of the Circuit Court of Augusta county on an application to correct an erroneous assessment of personal property for taxation. Judgment for the Commonwealth. Applicant assigns error.

*Reversed.*

The opinion states the case.

*Jos. A. Glasgow and H. H. Kerr*, for the plaintiff in error.

*Wm. A. Anderson, Attorney-General*, for the Commonwealth.

BUCHANAN, J., delivered the opinion of the court.

The plaintiff in error, who was the plaintiff in the trial court, was assessed for the year 1908 with certain taxes in Pastures District, Augusta county, to-wit: poll tax \$1.50, on \$50,000 of bonds, on \$400 cash in bank, and on an income of \$7,000. This assessment he claims was erroneous, on the ground that he was not a resident of the State during the year 1908. In the time prescribed by statute, he filed his petition in the circuit court for that county to have said assessment corrected. The court declined to grant the relief sought, and dismissed his petition. To that order this writ of error was awarded.

It appears that the plaintiff owns and has owned for eighteen or nineteen years a farm in Augusta county, which he has improved, and which he used occasionally as a summer home, but not continuously; that prior to the year 1907, for some ten or fifteen years, he gave in or was assessed and paid a capitation tax and taxes on bonds and income, in addition to taxes on his farm and tangible personal property in that county; that prior to the adoption of the present Constitution of the State he had registered as a voter, but whether or not he had ever voted does not appear; that he had not registered since the present Constitution had been in force; that at the De-

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ember, term, 1907, of court he had asked to be relieved from taxation on bonds, etc., in this State, upon the ground that he was a resident of Washington, District of Columbia, and not of this State, but the court had denied the relief sought; that he afterwards gave notice to the commissioner of the revenue of Pastures District, in writing, that he was not a resident of this State, and refused when called upon by the commissioner in 1908 to give in for taxation the subjects of taxation from which he now seeks to be relieved. It further appears that the plaintiff's wife owns a residence in Washington, D. C., where he, she, their children and servants have resided for the greater part of each year for more than twenty years; that they have spent a part of each year for some years at Atlantic City, New Jersey, and Palm Beach, Florida, where his wife owns property; that they travel about a good deal; and that during the last two years his wife had been at his farm in Augusta county for ten days or two weeks, and he himself had been there two or three times during that period for a few days. He testified that he was a resident of Washington, D. C., where he resided the greater part of his time, and that he was not a resident of Virginia, and had so declared in open court upon his former motion to be relieved from said taxation, and prior to 1908 had notified the commissioner of the revenue that he was a resident of Washington, D. C., and not of this State.

The trial court based its refusal to grant the relief sought, not upon the ground that the plaintiff was a resident of this State, but upon the ground that he was a citizen thereof, and that in order to be entitled to the relief sought he must comply with the provisions of section 40 of the Code, which is as follows:

"Whenever a citizen of this State, by deed in writing, executed in the presence of and subscribed by two witnesses, and by them proved in the court of the county or corporation where he resides, or by open verbal declaration made in such court and entered of record, shall declare that he relinquishes the

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character of a citizen of this State, and shall depart out of the same, such person shall, from the time of such departure, be considered as having exercised his right of expatriation, so far as regards this State, and shall thenceforth be deemed no citizen thereof."

That section, as was properly conceded by the Attorney-General, has no reference to residence or domicile, but relates entirely to citizenship and fealty, and the question of personal taxation is to be determined, not by the plaintiff's citizenship, but by his residence.

The State has no jurisdiction to assess a tax as a personal charge against a non-resident, nor as a general rule can the personalty of a non-resident be taxed unless it has an actual *situs* within the State. 1 Cooley on Taxation, pp. 24-25, 84-86, 641; Va. Code, 1904, secs. 487, 489.

The question involved in this case is whether or not the plaintiff was a resident of this State, within the meaning of the tax laws, in the year 1908, when assessed with the taxes complained of.

It is very difficult to give an exact definition of what is meant by "resident" or "residence," as used in particular statutes. The meaning of those words depends upon no one fact or combination of circumstances, but must be determined from all the facts and circumstances taken together in each particular case. *Long v. Ryan*, 30 Gratt. p. 720; 1 Cooley on Taxation, p. 641.

While the words "residence" and "domicile" are not convertible terms, the latter being a word of more extensive signification and including, beyond mere physical presence at the particular place, positive or presumptive proof of an intention to make it a permanent abiding place (*Long v. Ryan, supra*; 14 Cyc. 835), yet if those words be treated as synonymous, as is argued they should be, and as they frequently are in tax statutes (1 Cooley on Taxation, 641), it seems to us that all the facts and circumstances taken together show that the resi-

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dence or domicile of the plaintiff was in Washington city, and not in Augusta county.

To acquire a domicile in a particular place there must be a residence there and intention to make that place one's home. Treating the plaintiff as having had a domicile in this State prior to 1907, in order for him to acquire a domicile in Washington, D. C., it was necessary, first, that he should reside there, and, second, that he should intend to make that place his home. *Pilson v. Bushong*, 29 Gratt. 229; *Long v. Ryan*, *supra*; *Lindsay v. Murphy*, 76 Va. 428, 429.

But where a party is already abiding at a particular place while his domicile is elsewhere, and if while so abiding he forms an intention to make it his home permanently; or for an indefinite period, and he continues to abide there in pursuance of that purpose, he thereby acquires a new domicile. *Barron v. City of Boston*, 187 Mass. 168, 72 N. E. 951, 952.

In the case cited it was said that there was no requirement of law that he should give notice to assessors or anyone else of his change of domicile.

In the case under consideration the plaintiff had declared under oath in open court in 1907 that he was a resident of Washington city, and gave notice to the assessor of the district in which his farm was situated and where he had been assessed with taxes as a resident of this State, that he was a resident of Washington city. Since that time he and his family have resided for the greater part of the time in that city; they have spent only a few days at his farm in this State, and his conduct and acts since that time are not in conflict, but in accord, with his declared intention as to making his home in that city.

Of course, the declarations of a party as to intention in a case like this are of little value where they are in conflict with any reasonable interpretation which can be placed upon his acts and conduct; but there is nothing in this case to indicate that the plaintiff's declarations were not made in good faith.



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The Attorney-General insists, however, that even though the plaintiff be not a resident of this State, he is liable to the tax levied upon the money he had on deposit in bank in this State. It is well settled that a general deposit in a bank creates a relation of debtor and creditor between the bank and the depositor, and that although it is called a deposit it is a loan or a bailment. *Robinson v. Gardner*, 18 Gratt. 509, 510, cases cited. It is also clear from the provisions of sections 487 and 489, Va. Code, 1904, that money deposited in bank, as was the case here, was not treated as "tangible personal estate" and was not taxable on that ground, but was subject to taxation because the depositor was a person residing within this State, in the meaning of the tax laws. In the case of such resident money belonging to him, whether deposited in a bank in or out of the State, is taxable, but where he is not such resident the general deposits of his own money in a bank of this State are not taxable here. See *Com'th v. Williams*, 102 Va. 778, 10 E. 867; *Selden, Trustee, v. Brooke, Collector*, 104 Va. 52 S. E. 632.

The order of the circuit court must be reversed, and this court will enter such order correcting the erroneous assessment claimed of as the circuit court ought to have entered.

*Reversed.*

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Opinion.

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**Staunton.**

## ROSELLE v. COMMONWEALTH.

September 16, 1909.

1. EVIDENCE—*Parol Evidence to Contradict Writing—Rights of Third Persons.*—The rule that parol evidence will not be received to vary, alter or contradict the terms of a valid written contract, is applicable only to controversies between the parties to the contract, or their privies. It cannot affect third persons.
2. INTERSTATE COMMERCE—*Sale of Property Already in State.*—The test applied to determine whether personal property sold is to be regarded as belonging to interstate or to intrastate commerce is whether or not the property which is the subject of the sale is within the jurisdiction of the State at the time the sale is made. If it is, then it is an intrastate transaction, and subject to State regulation.

Error to a judgment of the Corporation Court of the city of Charlottesville convicting plaintiff in error peddling without a license.

*Affirmed.*

The opinion states the case.

*Harmon & Walsh*, for the plaintiff in error.

*Wm. A. Anderson*, Attorney General, for the Commonwealth.

HARRISON, J., delivered the opinion of the court.

The warrant in this case charges that the plaintiff in error did carry from place to place in the city of Charlottesville, picture frames, and did sell and barter the same, without first obtaining a license, in violation of the law imposing a tax upon peddlers.

The judgment of the police justice being adverse to the

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plaintiff in error, an appeal was taken to the corporation court of the city of Charlottesville, where the whole matter of law and fact was submitted to the court, and the judgment of conviction complained of rendered. The case is, therefore, before this court as upon a demurrer to evidence.

It appears that the Chicago Portrait Company, an Illinois corporation, sent out its soliciting agents to take orders for portraits and picture frames, which were to be subsequently delivered. A number of these orders were placed in the city of Charlottesville, among others, one with J. M. Burch. The soliciting agent of the company gave to each person from whom he secured an order a writing furnished by the company and signed by himself, stipulating that on or about a day named it would deliver a finely finished portrait for the sum of \$—, which the purchaser agreed to pay upon delivery. This memorandum concludes as follows: "In consideration of said purchase, and as a part of said contract of sale, the company agrees to deliver said portrait in a suitable frame, for which the purchaser agrees to pay the wholesale price. If the purchaser fails to pay for said frame upon delivery, the title thereto shall revert to the company, and the purchaser agrees to deliver the same forthwith to the company's agent." This paper is signed alone by the agent as salesman of the company.

The plaintiff in error was representing the Chicago Portrait Company, and it is contended that he was merely delivering goods that had been previously sold by his principal. J. M. Burch, from whom an order had been secured, was introduced as a witness on behalf of the Commonwealth, and testified that he had given an order to the soliciting agent of the company for a portrait, but that he had not ordered a frame; that the entire negotiation and sale to him of the picture frame, which he bought, was begun and concluded with the plaintiff in error at the time the portrait was delivered to him.

The first assignment of error is to the action of the corporation court in refusing to exclude the testimony of this

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witness, upon the ground that his evidence contradicted the terms of a valid written instrument.

Without stopping to consider whether or not the writing which was left with the witness and to which we have adverted shows a concluded sale of a picture frame, it is sufficient to say that the general rule of evidence here invoked is not of universal application, and that it only applies to controversies between parties to the contract or instrument which is the subject matter of the controversy and their privies. It does not apply to controversies between parties to the writing and third persons. 1 Greenleaf on Evidence, sec. 279; 1 Starkie on Ev. (10th ed.) 728; 2 Whart. Law of Ev., secs. 920, 923; 17 Cyc. pp. 749-750; *Bruce v. Lumber Co.*, 87 Va. 381, 13 S. E. 153, 24 Am. St. Rep. 657; *Barreda v. Silsbee*, 21 How. 169, 16 L. Ed. 86.

In this case the Commonwealth was not a party or privy to the writing relied on, and the evidence objected to was competent on her behalf to sustain the prosecution.

As said in Greenleaf on Ev., *supra*: "The rule under consideration is applied only (in suits) between the parties to the instrument, as they alone are to blame if the writing contains what was not intended, or omits that which it should have contained. It cannot affect third persons, who, if it were otherwise, might be prejudiced by things recited in the writings, contrary to the truth, through the ignorance, carelessness or fraud of the parties; and who, therefore, ought not to be precluded from proving the truth, however contradictory to the written statements of others."

The second ground of error involves the contention that the revenue law of Virginia, so far as applied in this case, operated as a hinderance of and interference with interstate commerce, and was, therefore, void, as being in contravention of the commerce clause of the Federal Constitution. In support of this contention, *Caldwell v. North Carolina*, 187 U. S. 622, 47 L. Ed. 336, 23 Sup. Ct. 229; *Rearick v. Penn.*, 203 U. S. 507,

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L. Ed. 295, 27 Sup. Ct. 159, and other cases in line there-  
1, decided by the Supreme Court, are relied on.

We recognize the controlling effect of these decisions and  
2 no disposition to controvert the doctrine announced by  
3 n. There can be no question that the transactions which  
4 e the subject of investigation in *Caldwell v. North Carolina*,  
5 in the class of cases to which that case belongs, must be con-  
6 red in the light of those decisions as interstate transactions.

7 test which seems to determine whether the transaction is  
8 e regarded as belonging to interstate or to intrastate com-  
9 ce is whether the property which is the subject matter of  
0 sale is within the jurisdiction of the State at the time the  
1 is made.

2 he evidence in this case shows that the plaintiff in error  
3 in his possession a considerable consignment of pictures and  
4 ure frames from the Chicago Portrait Company. It fur-  
5 shows that none of those from whom orders were secured  
6 e obliged to take frames, but that the purchase of a frame  
7 the subject of negotiation at the time the picture was de-  
8 ed. The testimony of J. M. Burch, which must be taken  
9 ue, shows that the entire negotiation and sale of the picture  
0 ne which he bought was begun and concluded in Char-  
1 ville, Va., where the frame was.

2 e will conclude the consideration of this assignment of  
3 r with what was said in the case of *Chrystal v. Mayor, etc.*,  
4 *Macon, Ga.*, 108 Ga. 27, 33 S. E. 810, which is entirely  
5 inent and applicable to the facts of the case at bar.

6 The Chicago Portrait Company carried on, through its  
7 its in this State, a business, the nature of which is suffi-  
8 tly indicated in the headnotes. Chrystal, one of its de-  
9 -ing agents, was in the municipal court of the city of Macon,  
0 icted of 'doing business in said city without a license.' The

1 defense he set up was that the ordinance under which he  
2 prosecuted was violative of the interstate commerce clause of  
3 Federal Constitution, and his petition for *certiorari* pre-

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sented for adjudication this question only. The judge of the superior court refused to sanction the petition, and the cause is here for review.

"We have, without serious difficulty, reached the conclusion that, in so far as the business in question related to the sale and delivery of picture frames, it was certainly outside the scope and operation of the above mentioned clause of the Constitution of the United States. No customer of the portrait company agreed to purchase or was bound to take and pay for a picture frame, unless he chose to do so after inspecting the portrait which he had ordered; and in case he then desired to purchase a frame, he selected it from a stock of frames which had already been shipped from Illinois into Georgia, consigned to and received by the company's agent here. The mere fact that at the time of ordering the picture the customer may have reserved the right to select and buy a picture frame is of no consequence whatever. Nor does it matter that the so-called privilege of purchasing picture frames from this company was exclusively in those who had ordered pictures. In no view of the matter could it be fairly said that a binding contract of any description relative to the purchasing of a picture frame existed between the company and any purchaser until a sale negotiated in this State was actually effected here. It was argued that a portrait and its frame were so intimately connected that both together really constituted a unit or single thing. This may be quite true, after a portrait is placed in a frame; but, manifestly, until this has been done they are separate and distinct things, each having its own independent commercial value, and the scheme of the very business under discussion distinctly recognizes that this is so. The company unquestionably sells portraits without selling frames; and, when it does sell a frame, that is a complete transaction in and of itself."

Entertaining these views as to the facts of the case at bar, we are of opinion that the judgment complained of is right, and must be affirmed.

*Affirmed.*

Syllabus.

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**Staunton.**

HOT SPRINGS LUMBER AND MANUFACTURING CO. v. REVERCOMB.

September 21, 1909.

1. LOGS AND LOGGING—*Floatable Stream—Case at Bar.*—In order to constitute a stream a public highway it must be of such a character as that it can be substantially useful to the public in transporting the products of the field and forest. A stream that is so narrow and rapid, and rises and falls so suddenly and unexpectedly that it cannot be made of substantial, practical use for floating logs is not a floatable stream, and, if the facts stated in the declaration in the case at bar be proved, then the stream mentioned therein is not a public highway, and the demurrer to the declaration was properly overruled.
2. PLEADING—*Declaration Good in Part—Presumption as to Proof.*—Where a declaration is good as to a part of the cause of action therein stated, the presumption is that the trial court confined the proof upon it within proper bounds.
3. APPEAL—*Grounds of Demurrer—New Grounds.*—A defendant is bound by the grounds of demurrer assigned in the trial court, and cannot present new grounds for the first time in the appellate court.
4. WITNESSES—*Experts—Decision of Trial Court—Case at Bar.*—Whether or not a witness is an expert is a question for the trial court, subject to review on appeal under the limitations applicable to the review of the exercise of discretion. In the case at bar, the trial court was satisfied with the qualifications of the witness, and this court is unable to say, as a matter of law, that its discretion was improperly exercised.
5. WITNESSES—*Experts—Opinions—Floatable Streams.*—A witness who has made the floating of logs a part of the business of his life, and who possesses an intimate acquaintance with the stream with reference to which he testifies, and a thorough knowledge of the uses to which it is sought to be applied, may give his opinion as to whether or not the stream is floatable. Such opinion would be of distinct value to the jury in arriving at a correct conclusion, and in no other way could he convey to the minds of a jury

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of ordinary experience and average intelligence a correct and intelligent appreciation of the stream. For an elaborate discussion of opinion evidence, see opinion of the court.

6. **BILLS OF EXCEPTION—When Unnecessary.**—Where the want of power in a court to enter an order appears on the face of the record no bill of exception is necessary.

7. **BILLS OF EXCEPTION—Signing—Agreement of Counsel—Motion for New Trial.**—Pending a motion for a new trial of an action at law, and while the same is undecided, the whole matter is within the breast of the court, with full power to sign such bills of exception and enter such judgment as may be proper, regardless of the agreement of the parties that bills of exception may be filed within sixty days after verdict.

8. **BILLS OF EXCEPTION—Certifying Evidence—Failure to Identify—Nunc Pro Tunc Order.**—The evidence inserted in a bill of exception by reference must, in some way, be identified or earmarked by the judge under his own hand, otherwise it is no part of the bill and cannot be considered by an appellate court. If not so identified, within the time prescribed by law for taking the bill, it cannot be so identified afterwards by a *nunc pro tunc* order. The identification of the evidence to be inserted in a bill of exception is a judicial act to be performed by the judge himself within the time prescribed for filing the bill, and cannot be delegated to the clerk. A skeleton bill containing such expressions as "here insert the evidence," without earmarking the evidence to be inserted, is not a compliance with the law.

Error to a judgment of the Circuit Court of Bath county in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

*Affirmed.*

The following is a copy of the first, second and fifth counts of the amended declaration filed May 25, 1907:

Virginia: Bath County, to-wit:

"In the Circuit Court of said county:

"H. A. Revercomb complains of the Hot Springs Lumber and Manufacturing Company, Incorporated, and the Jackson and Cowpasture Boom Company, Incorporated, defendants, of a plea of trespass on the case for this, to-wit: That at and



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before the time of the grievances hereinafter complained of, and at this time, the plaintiff was, has been, and is now the owner in fee simple and in possession of a farm situated in Bath county, on Jackson river, which said farm is worth a large sum, to-wit: the sum of \$12,000.00 and that he is the owner of the land on both sides of the said river and the bed of said river where it passes through his said land; and the plaintiff avers that the said stream known as Jackson river flows through a steep, rugged, mountainous country for a great portion of its length, and said stream is a narrow, swift-running, fresh water mountain stream; that it is very crooked, and the banks in many places are very low where it passes through the plaintiff's lands, and at other places; and the plaintiff avers that trees and underbrush grow along the banks of said stream in some places, and in many places small islands and sand bars have formed and are now in the channel of said stream, and large boulders of rock have been formed and are now in the channel of said stream at many places; and the plaintiff avers that the said stream is not a floatable stream, and is not a navigable stream; and the plaintiff avers that the said stream cannot be used by the public as a means of floating logs or timber, or other products of forests or fields to mill or to market, profitably or practicably, for the reason that said stream will not, in its normal condition, wash logs down its channel but will only wash logs down its channel when the water in said stream is increased so as to make it deep and swift enough for that purpose; and the plaintiff avers that when the increased precipitation of water in said stream occurs and makes said stream deep and swift enough to wash logs down the channel thereof, it cannot be used profitably or practicably for the purpose of washing logs down the channel of the same to mills or market, for the reason that the water in said stream, by reason of its being a rough, crooked, swift-running stream, runs with such force and so rapidly, and runs over the banks of the river along the said stream, that it piles the logs along the

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banks and in the channel of said stream, and carries logs frequently a great distance from said stream out into sluices, and into the fields and as often as the logs are put back in said stream the swift current throws the said logs out onto the banks, or piles them up in inaccessible places, and the water rushes on down the current of said stream and leaves the said logs strewn along the banks of the stream, or piled in the channel thereof, and it is impossible to keep said logs in said stream so they can be floated down same, and after the water passes on down said stream and leaves said logs as aforesaid, there is not sufficient water to wash the logs down the channel of said stream; and the plaintiff avers that when said stream becomes sufficiently high to wash logs down the channel thereof that it runs away so quickly that it leaves the logs strewn along the banks and in the channel thereof; and the plaintiff avers that the said stream will not rise to and remain at such height as will enable logs or other products of the fields or forests to be profitably or practicably floated down said stream to mills or market; and the plaintiff avers that the said stream, by reason of its condition, as aforesaid, cannot be used by the public as a public highway for the purposes of transporting the products of the fields or forest to mills or market with profit or success; and the plaintiff avers that the said stream will not float logs as hereinbefore stated in its normal condition, and the times when said stream, by increased precipitation of water will wash logs down the channel thereof, come so unexpectedly and with such irregularity, and is so uncertain as to when the volume of water in said stream will be sufficient to wash the logs down the same, and it is so uncertain when said stream will rise to and remain at such height as to enable logs to be washed down the channel thereof, that the public cannot calculate with tolerable or reasonable certainty as to the times or seasons the water in said stream will rise to and remain at such height as to enable it to profitably or practicably use said stream as a means of transporting logs or other products of the

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fields to mill or market, by floating them in said stream, and the plaintiff avers that the said stream, for the reasons aforesaid, cannot be used by the public for the transportation of logs or timber or other products of the fields or forest to market; and the plaintiff avers that by reason thereof the said stream is not a public stream, or a public highway, and the reason aforesaid, the said stream is a private stream, and that the defendants had no right to attempt to use the said stream, as hereinafter stated, as a public highway, by attempting to float logs in the same; and the plaintiff avers that the defendants knew the character and condition of said stream at the time they set forth, and they knew that the said stream was not a public stream, or a navigable stream, and they knew that the said stream was not a public stream, or a public highway, and they knew that the same was a private stream; and the plaintiff avers that the defendants, with full knowledge of the location and character of said stream, as above set forth, entered the lands of the plaintiff on said stream, and wrongfully and illegally cut and put into said stream a great number of logs, and purchased from other persons saw-logs which had been wrongfully and illegally placed in said stream on the lands of the plaintiff, for the purpose of having the same floated by them, as aforesaid, and those cut and placed in said stream, as aforesaid, washed down the said stream onto the lands of the plaintiff to the saw mill of the defendant Hot Springs Lumber and Manufacturing Company, and the plaintiff avers that after the said logs were floated in said stream by the defendants, as aforesaid, and the plaintiff had purchased logs from others, which had been placed in said stream, as aforesaid, to-wit: on the — day of — and on the — day of —, 1905, the volume of water in said stream was increased and made sufficiently deep to wash the logs placed in said stream, as aforesaid, and the logs purchased by the defendants from other persons, as aforesaid, down said stream by the water onto the lands of the plain-

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tiff; and the plaintiff avers that the said logs thus washed down the said stream, were piled up by the water in heaps and jams, in the channel of said stream along the plaintiff's land, and along the banks of his land, which caused the water in said stream to be run out of its natural channel onto the lands of the plaintiff, and the logs of the defendants which came down said stream after the formation of said jam and the water in said stream were driven and thrown onto the plaintiff's land, and a great portion of the plaintiff's land was thereby washed away and destroyed, and a great portion of the residue injured and damaged, and the natural bank of the said stream along his said land were thereby washed away and destroyed, which caused the land of the plaintiff along said stream to fall into said stream and be washed away; and the plaintiff avers that by reason thereof his land has been greatly injured, and a great portion thereof has been cut and washed away and totally destroyed; and the plaintiff avers that before his said land was cut and washed as aforesaid, that there were natural banks along said stream which were not affected by the water or other things floating therein, but the plaintiff avers that since his land has been cut and washed away and damaged as aforesaid, which was caused by the logs of the defendant, as aforesaid, that his said lands along the said stream have been left in an exposed and washed condition, so that the water of said stream, or logs or other things washing therein, now continually washes and cuts away his lands along said stream, and the damage to his lands is a continuing damage to the plaintiff's land, and his land; by reason of being left in the exposed and washed condition, as aforesaid, is now being continually destroyed by the water in said stream, and that in order to prevent the continuing damage and total destruction of the plaintiff's land, the plaintiff will be obliged to build expensive walls or abutments along the banks of said stream where it passes through his land in order to prevent and protect his lands from total destruction by the water in said stream, which said walls or abutments will cost the plaintiff a large

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to-wit: At least the sum of \$1,700.00. And the plaintiff that the necessity imposed on him to build said walls or rents in order to protect his said lands from total destruction at the said cost of \$1,700.00 as aforesaid was caused by the defendants wrongfully and illegally putting said logs into said stream and wrongfully and illegally attempting to have said logs piled up or floated down said stream through the lands of the plaintiff as aforesaid, and permitting the said logs to be piled up and jams in the channel of said stream along the plaintiff's land, and permitting the said logs to be washed onto, across and upon the plaintiff's land along said stream, thereby damaging, injuring and destroying the same, as aforesaid, to the damage of the plaintiff, \$2,000.00."

*"Second Count.*

and for this, also, to-wit: That before and at the time of the wrongs hereinafter complained of, and at this time, the plaintiff, L. A. Revercomb, was, has been and is now the owner in fee simple and in possession of a farm consisting of several hundred acres of land situated in Bath county, on Jackson river, which farm is worth a large sum, to-wit, the sum of \$12,000.00; and he is the owner of the said land on both sides of the said stream and is the owner of the bed of said river where it passes through his said land; and the plaintiff avers that the said stream, known as Jackson river, flows for some distance, through a steep, rugged, mountainous country; and the plaintiff avers that the said stream is a narrow, swift-running, fresh water mountain stream; that it is very crooked and the banks in many places very low; and the plaintiff avers that trees and underbrush grow along the banks of said stream in many places, and in some places small islands and sand bars have formed and are now in the channel of said stream, and that in some places large boulders of rock have been formed and are now in the channel of said stream; and the plaintiff avers that said stream is not

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a floatable stream, and that it is not a navigable stream; and the plaintiff avers that the said stream cannot be used by the public profitably and practicably for the purpose of floating to mill or market logs or other products of the forest or fields, for the reason that the said stream will not, in its normal condition, wash logs down its channel, but will only wash logs down its channel when the water in said stream is increased so as to make it deep and swift enough for that purpose; and the plaintiff avers that when the increased precipitation of water in said stream makes it deep and swift enough to wash logs down the channel thereof it cannot be used profitably or practicably by the public for the purpose of floating logs down the channel of the same to mill or market, for the reason that the water in said stream by reason of its being a rough, crooked, swift-running stream, runs with such force and so rapidly that it piles the logs along the banks and in the channel of said stream, and carries the logs frequently a great distance from the said stream out into sluices, and into the fields, and as often as the logs are put back into the said stream the swift current throws said logs out on the banks or piles them up in inaccessible places, and the water, by reason of its running so very swiftly, passes on and leaves the logs strewn along the banks of the stream, or piled in the channel thereof, and after the water passes on and leaves the logs, as aforesaid, in said stream and along the banks thereof there is not sufficient water to wash the said logs down the channel of said stream; and the plaintiff avers that the seasons or times when said stream, by the increased precipitation of water, will wash logs down the channel thereof comes so unexpectedly and with such irregularity, and it is so uncertain as to when the volume of water in said stream will be sufficient to wash logs down the channel thereof, that the public cannot calculate with reasonable or tolerable certainty as to the times or seasons when said stream will rise to and remain at such height as to enable it to make profitable or practicable use of said stream as a means for transporting logs or other products to mill

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et by floating them in said stream; and the plaintiff at the said stream, for the reasons aforesaid is not a stream and is not a navigable stream; and the plaintiff at the said stream is not such a stream as can be made al use of by the public for the purpose of transporting imber or other products of the forest or fields to mill or and the plaintiff avers that the said stream is a private and that the defendants had no right to attempt to use am as a public highway by attempting to float logs in ; and the plaintiff avers that the defendants knew the r and condition of said stream, as above set forth, and at the said stream was not a floatable stream, or a navi- eam; and the defendants well knew that the said stream ivate stream; and the plaintiff avers that the said de-, with the full knowledge of the character and con- ' said stream and of the facts as hereinabove set forth, on the said stream above the lands of the plaintiff and and wrongfully cut and put into said stream a great of saw-logs, and purchased logs from other persons who rally and wrongfully placed the same in said stream purpose of having said logs so cut and piled into said is aforesaid, and those purchased from others which placed in said stream as aforesaid, washed or floated e channel of said stream to the sawmill of the defend- Hot Springs Lumber and Manufacturing Company, In- ed, which is situated below the lands of the plaintiff: plaintiff avers that when the said logs were put into the am, as aforesaid, by the defendants for the purpose of hem washed down the said stream, the volume of water stream was increased and the said logs were washed id stream on the — day of —, 1904, and on the — —, 1905, and piled up in heaps and jams by the water annel of the stream and along the banks thereof where am passes through the lands of the plaintiff; and the avers that the logs, by reason of being piled in heaps

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and jams as aforesaid turned the water from its natural course, where it was accustomed to flow and caused the water and the logs running in the same to run against and strike and cut away, injure and destroy the plaintiff's land; and the plaintiff avers that it became and was the duty of the defendants to follow the said logs down said stream after they were put in said stream and permitted to wash down the same as aforesaid, with reasonable promptness and dispatch, with men who were capable and sufficient to remove the said heaps and jams, which had formed in said stream along the bank thereof as aforesaid with reasonable promptness and dispatch and to use ordinary care to prevent said logs from injuring the plaintiff's land. But not regarding their duty in this particular the said defendants carelessly and negligently failed to follow the said logs down the said stream after they were put in the same with reasonable promptness and dispatch and failed to break up and remove the heaps and jams of logs formed in said stream as aforesaid along the lands of the plaintiff with reasonable promptness and dispatch, and the said heaps and jams of logs formed as aforesaid in said stream and along the bank thereof through the lands of the plaintiff were carelessly and negligently permitted by the defendants to remain in the position in which the said logs had been thrown by the water in heaps and jams as aforesaid, for an unreasonable length of time, to-wit: for a great number of days and nights; and the plaintiff avers that the heaps and jams of logs aforesaid which were thus carelessly and negligently permitted to remain in the channel of the said stream and along the banks thereof along the lands of the plaintiff as aforesaid caused the water in said stream to be turned from its natural channel where it was accustomed to run and caused the water in said stream and the logs placed therein by the defendants as aforesaid, as they washed down to said heaps and jams to be thrown or washed against the lands of the plaintiff, and the said logs and water thus thrown against the plaintiff's land cut away, destroyed and washed away



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eat portion of the lands of the plaintiff and greatly damaged and injured a great portion of the residue of his said land; the plaintiff avers that before his lands were injured by the defendant's logs as aforesaid that the banks of the river along said lands had formed natural banks which were not cut by the water or other things, but the plaintiff avers that since his said land has been cut away and destroyed as aforesaid, which was caused by the logs of the defendants as aforesaid that his lands along the banks of said stream have been left in a wasted and exposed condition so that the water in said stream now continually washes away and destroys the plaintiff's land; and the plaintiff avers that the damage to his land and was caused by the careless and negligent manner of the defendants in attempting to float logs in said stream in this manner, to-wit: the defendants carelessly and negligently failed to follow up said logs and remove the jam in said stream and on the banks of the plaintiff's land where said stream passes through same with reasonable promptness and dispatch, and was caused by the said defendants carelessly and negligently causing the said logs and jams to remain in heaps and jams for an unreasonable length of time, as aforesaid, which caused the water in said streams to injure the plaintiff's lands as aforesaid; and the plaintiff avers the damage to his lands as aforesaid caused by the said logs of the defendant as aforesaid is continuing damage and that his said lands are being continually washed away and destroyed and that in order to protect his land from total destruction it will be necessary for him to build walls or abutments along the banks of said stream where it passes through his lands, which said walls or abutments will cost the plaintiff a large sum of money, to-wit: a sum of \$1,700.00. And the plaintiff avers that the necessity imposed on him to build said walls or abutments to protect and prevent his said land from total destruction at the cost of \$1,700.00 was caused by the defendants wrongfully and illegally putting said logs and timber into said

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stream as aforesaid and attempting to float the same down the said stream and by reason of the said careless and negligent manner of the defendants in attempting to float said logs in said stream through the lands of the plaintiff in not following up said logs in said stream and removing the said jams or heaps with reasonable promptness and dispatch after the said logs were formed into heaps and jams as aforesaid, to the damage of the plaintiff, \$2,000.00."

*"Fifth Count.*

"And for this, also, to-wit: That heretofore, to-wit: at and before the time of the grievances hereinafter complained of, and up to the present time, the plaintiff H. A. Revercomb, was, has been and is now, the owner, in fee simple, and in possession of a farm of several hundred acres of land situated in Bath county, on Jackson river; that he owns the said land through which the said river flows, including the bed and banks of said stream; and that the defendants went above the lands of the plaintiff on said stream and cut and illegally and wrongfully put into said stream above the plaintiff's said land a great many saw-logs, and logs of different kinds and purchased from other persons who had wrongfully and illegally put logs into said stream, a great number of logs for the purpose of wrongfully and illegally floating the said logs down said river to the sawmill of the defendants, which sawmill is situated on said stream below the land of the plaintiff.

"And the plaintiff avers that the said stream is not a navigable stream, and is not a floatable stream; that it is a crooked, swift-running, fresh water stream; that the banks of the same are very low; and plaintiff avers that it is a private stream; and the plaintiff avers that the defendant knew this when he put said logs into said stream, and when he purchased the logs from other persons, which had been put into said stream for the purpose of having them washed down said stream, as aforesaid; and the plaintiff avers that on the — day of —, 1904, and on

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05, the water in said stream became deep wash the said logs from where they had ran down onto the lands of the plaintiff; and that the said logs thus put into said stream, and those purchased by them from the defendant, and those purchased by them from the defendant, were washed down said stream onto the plaintiff and into his enclosed lands. And that the said defendant, against the will of the plaintiff, and against his protest and consent, broke and entered the plaintiff's close and took their teams and wagons and a number of men whom they employed, onto the plaintiff's land and hauled, dragged and carried said logs over the plaintiff's land, and shed thereon, as aforesaid, over through the plaintiff's land and placed said logs in said stream, causing the same washed down said river; and that when said logs were placed in said stream, that they continued to wash out onto the plaintiff's land, and passed through the same in said stream, and did so, the defendant with their teams entered upon the plaintiff's land and hauled said logs back into said river; and the plaintiff caused said logs into said stream from the lands aforesaid, the defendant with their horses and a number of men travelled over plaintiff's land and caused said logs to be cut up and injured his land with dragging said logs over the same; and the defendant trespassed on his land, as aforesaid, and against the will of the plaintiff, and destroyed, and wrongfully and illegally against his protest, and to his great injury, the said plaintiff the said defendant then caused damage of the said plaintiff \$2,000.00, and asks his suit."

JOHN W. STEPHENSON,  
GEO. A. REVERCOMB, p. q.

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Bill of exception No. 2 which was intended to certify the evidence, was a mere skeleton bill, and did not incorporate the evidence. So far as it relates to the evidence, it was as follows:

“Be it remembered that after the jury was sworn to try the issue joined in this cause, the plaintiff to prove and maintain the said issue on his part introduced the following evidence:

“(Here insert the evidence in chief introduced on his behalf.)

“And the defendant the Hot Springs Lumber and Manufacturing Company, Incorporated, to maintain the issue on its part introduced the following testimony.

“(Here insert the evidence in chief for the defendant.)

“And the plaintiff in rebuttal introduced the following testimony:

“(Here insert the testimony introduced by the plaintiff in rebuttal.)

“And the said defendant in surrebuttal introduced the following evidence:

“(Here insert the evidence introduced by the defendant in surrebuttal.)

“Which was all the evidence introduced.”

This bill was signed in January, 1908. In July, 1908, the defendant sought to have this bill amended by an order entered *nunc pro tunc*. The proceedings had at that time sufficiently appear from a bill of exception taken by the plaintiff to the action of the court in making said order, which bill is as follows:

*“Plaintiff’s Bill of Exception No. 1.*

“Be it remembered that on the 20th day of July, 1908, that being the first day of the July term, 1908, of the Circuit Court of Bath county, Virginia, the defendant, Hot Springs Lumber and Manufacturing Company, Incorporated, moved the said court to enter in this cause an order *nunc pro tunc* certifying as all of the evidence and as the true evidence introduced upon



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said court to copy into said exceptions all the evidence introduced at the trial to the court and jury.

"And the undersigned desires to have an order entered at length in said bill of exceptions, the true evidence referred to by the court therein. This is to notify you, therefore, that on the first day of the next term of the Circuit Court of Bath county, Virginia, that day being the 20th day of July, 1908, the undersigned shall move said Circuit — of Bath county to enter an order *nunc pro tunc* in said cause certifying the true evidence introduced in said cause, and embracing the same more clearly and distinctly in the bill of exceptions above referred to, which was duly made a part of the record in said cause as above stated.

"Respectfully,

"HOT SPRINGS LUMBER AND MANUFACTURING  
COMPANY, INCORPORATED,

"By Counsel.

"McAllister & Nelson,

"Harmon & Walsh, p. q.

"The plaintiff appeared at the time stated in said notice and demurred thereto, in which demurrer the defendant, Hot Springs Lumber and Manufacturing Company, Incorporated, joined and upon which demurrer the court entered judgment in favor of said defendant. The plaintiff thereupon moved the court to quash said notice, but the court after hearing argument of counsel upon said motion to quash denied said motion and refused to quash said notice.

"Thereupon, said defendant in support of the motion referred to in the notice aforesaid introduced as witnesses on its behalf J. T. McAllister and F. L. LaRue.

"The said McAllister, one of the witnesses called in behalf of the defendant, Hot Springs Lumber and Manufacturing Company, testified that he was one of counsel for defendant in the trial of this cause at the November term, 1907, of this court;



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same; that the said transcript from the time it was written by the stenographer from his shorthand notes up to the time it was presented to the judge of this court with the aforesaid bills of exceptions, to-wit: on January 24, 1908, was not in possession of the judge of the court; that before the judge of this court signed said bill of exception No. 2 he did not, so far as the witness knows, read all of said evidence; that the said judge of this court on the 24th day of January, 1908, neither at or before the signing the said bill of exceptions labeled said stenographic transcript aforesaid as the true evidence in the case, but having the same before him, examined the testimony of various witnesses as therein set forth and in the bills of exceptions Nos. A, B, C, D, E, F, G, H (I, J, K, L,) and M, also signed by the judge of this court on the said 24th of January, 1908, which bills of exceptions the said witness produced and offered in evidence, which several bills of exceptions referred to the stenographer's report of evidence by both the name of the witness, the page on which the testimony appears and ends, and also directions in said bills of exceptions to the clerk to copy additional evidence or other parts of the stenographer's report, in which directions reference is made by page and otherwise to said stenographer's report. That the said stenographer had made two complete copies of the said transcript, and that upon the said 24th day of January, 1908, after all the bills of exceptions signed on that date by the judge of this court had been signed by him, witness delivered one of said copies to counsel for plaintiff, by whom it was, after the expiration of about two weeks or more, returned to witness. The defendant also introduced in evidence the said stenographer's transcript aforesaid, which contains in the judge's own handwriting certain changes in said stenographer's transcript, but said changes made by said judge were made by him after said bills of exceptions were signed on the 24th day of January, 1908, but before said final judgment was entered.

"F. L. LaRue, another witness introduced on behalf of the





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the demurrer. And the court having inspected the stenographer's report of the evidence tendered with said motion, which said evidence is in two parts, beginning with the evidence of H. A. Revercomb, the plaintiff, on page one, and ending with the recross-examination of W. T. Kelley on page 199 of part one and beginning with the evidence of G. A. McAllister on page 200 of book or part No. 2 and ending with the conclusion of the testimony of E. G. Helmintoller, at the conclusion of book or part No. 2 of said evidence on page 383, both of which parts have the following endorsements thereon, which endorsement was placed thereon on the 20th day of July, 1908: 'This is the evidence referred to in bill of exceptions No. 2 in the case of H. A. Revercomb, plaintiff, v. Hot Springs Lumber and Manufacturing Company, Incorporated, etc., at the November term of this court, 1907, Exhibit No. A, July 20, 1908, and signed Geo. K. Anderson, Judge, and the several bills of exceptions signed, sealed and made a part of the record, and the reference therein to said evidence so marked as aforesaid by reference to said evidence by pages and otherwise, it is hereby certified at this, the July term, 1908, of the Circuit Court of Bath county, now for then, that the said evidence earmarked by this court and signed by it in the manner in the order above set forth, is the evidence and all the evidence which was adduced at the trial of this cause at the November term, 1907, of this court and is the same evidence referred to in bill of exceptions No. 2 signed by the judge of this court on the 24th day of January, 1908, which said evidence was in the hands of the court and was approved by said judge as the true evidence in this cause at the date when said bill was so signed, and the evidence so marked as aforesaid is the evidence the clerk was directed to copy into said bill of exceptions No. 2.'

"To the entering of which said *nunc pro tunc* order in this cause on the 20th day of July, 1908, the plaintiff then and there by counsel excepted and has this 19th day of August, 1908, within thirty days after the end of the July term, 1908, of the



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a verdict rendered against the defendant for \$1,650; and the case is before us for review upon a writ of error awarded by one of the judges of this court.

The declaration, as amended, consisted of five counts. The court struck out the third and fourth counts, and the first assignment of error is to the overruling of the demurrer to the first, second and fifth counts.

The first count, omitting its formal parts, avers that the said stream cannot be used by the public as a means of floating logs and timber profitably or practicably, for the reason that said stream will not, in its normal condition, wash logs down its channel, but will only wash logs down its channel when the water in said stream is increased so as to make it deep and swift enough for that purpose; and the plaintiff avers that when the increased precipitation of water in said stream occurs and makes said stream deep and swift enough to wash logs down the channel thereof, it cannot be used profitably or practicably for the purpose of washing logs down the channel of the same to mills or market, for the reason that the water in said stream, by reason of its being a rough, crooked, swift-running stream, runs with such force and so rapidly, and runs over the banks of the river along the said stream, that it piles the logs along the banks and in the channel of said stream, and carries logs frequently a great distance from said stream out into sluices and into the fields, and as often as the logs are put back in the said stream the swift current throws the said logs out onto the banks, or piles them up in inaccessible places, and the water rushes on down the current of said stream and leaves the said logs strewn along the banks of the stream, or piled in the channel thereof, and it is impossible to keep said logs in said stream so they can be floated down same, and after the water passes on down said stream and leaves said logs as aforesaid, there is not sufficient water to wash the logs down the channel of said stream; and that when said stream becomes sufficiently high to wash logs down the channel thereof,



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The second count follows the first in its averments as to the character of the stream, and contains also allegations of negligence in the use of the stream, in that when the logs jammed the defendant failed to break the jams in a reasonable time. This allegation the petition concedes is sufficient, if properly submitted to the jury, and of course that ends the controversy with respect to this count upon the demurrer.

With reference to the fifth count, the only ground of demurrer assigned is "that it can only be held good as to the matter of leaving down the fences, which would be negligence in removing the logs"; which is a concession that it is, to that extent, a good count upon demurrer, and the presumption, of course, is that the trial court confined the proof upon it within proper bounds. As the defendant is bound by its assignment of grounds of demurrer, the objection to the fifth count, first presented in this court, that the suit is against joint trespassers, while this count declares against only one defendant and does not state which one, must also fall.

We are of opinion that the demurrer to the declaration was properly overruled.

The next error assigned is stated in the petition as follows: "The court committed further error in admitting opinion evidence as to certain features of the case. It is well settled that expert evidence is not proper where the jury can form a decision from the facts without assistance. Matters of common knowledge, which ordinary persons, without peculiar knowledge or skill, can comprehend are not subjects of expert evidence. Furthermore, the admission of evidence as to conclusion was plainly error."

This assignment is so general as scarcely to comply with our rule upon the subject. A number of witnesses expressed opinions upon a variety of topics, several of them as to value about which there can be no doubt that the opinion of witnesses is generally admitted; some of them as to the cost of doing certain work in order to protect the banks of the stream against



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improper, but that the witness had not been shown to be an expert. This was followed by proof upon that question which satisfied the court. The qualification of a witness as an expert is one for the court, while the weight to be attached to his evidence is for the jury. It is a question addressed to the sound discretion of the trial court, which may be reviewed by this court under the limitations applicable to the review of exercise of discretion; and as the facts testified to by the witness plainly establish his expertness with respect to the matter about which he testified, we might be justified in overruling the exception upon the ground that the objection as to qualification had been removed to the satisfaction of the trial court, and that we are unable to say as a matter of law that its discretion had been improperly exercised.

But let it be conceded that the objection as taken opens up the whole subject, and that we may consider the propriety of expert testimony upon such a subject.

This subject is discussed with great discrimination and learning in the third volume of Wigmore on Evidence, chapter 65, beginning with section 1917. We regret that it is too extensive for quotation in an opinion. The conclusion of the author is, at section 1928, as follows: "If we prefer to make the rules of evidence our tools rather than to become ourselves their helpless slaves, then we shall allow the witness to state freely all the results which he is qualified to reach, and only now and then, when he comes to matters as to which it is instantly clear that the jurors are, or can be, as fully equipped with the data, we shall exclude his inferences."

In a note to section 440, Greenleaf on Evidence (15th ed.), it is said: "Whether a non-expert is qualified to give an opinion is for the judge. A farmer is qualified to give an opinion as to the effect of constructing a railroad through the farm of his neighbor, upon the convenience and expense of carrying it on." (Citing *Tucker v. Mass. Cent. R. Co.*, 118 Mass. 546.) "And generally opinions, like other testimony, are competent in the





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fact in issue. This inference depends on experience. . . . Now when this experience is of such a nature that it may be presumed to be within the common experience of all men of common education, moving in the ordinary walks of life, there is no room for the evidence of opinion; it is for the jury to draw the inference."

"Opinions," it is said in 7 Am. & Eng. Ency. L. at p. 493, "are never received if all the facts can be ascertained and made intelligible to the jury, or if it is such as men in general are capable of comprehending and understanding. The ordinary affairs of life cannot be the subject of expert testimony."

In *Clifford v. Richardson*, 18 Vt. 620, the case is well put: "When all the pertinent facts can be sufficiently detailed and described, and when the triers are supposed to be able to form correct conclusions without the aid of opinion or judgment from others, no exception to the rule is allowed. But . . . facts are sometimes incapable of being presented with their proper force and significance to any but the observer himself. . . . Under these circumstances, the opinions of witnesses must of necessity be received."

As was said by the Supreme Court of Pennsylvania in *Graham v. Pennsylvania Co.*, 139 Pa. 149, 21 Atl. 151, 12 L. R. A. 293: "In those matters where mere descriptive language is inadequate to convey to the jury the precise facts or their bearing on the issue, the description by the witness must of necessity be allowed to be supplemented by his opinion, in order to put the jury in position to make the final decision of the fact."

In *Commonwealth v. Sturtivant*, 117 Mass. 122, 19 Am. Rep. 401, the court said: "The exception to the general rule that witnesses cannot give opinions, is not confined to the evidence of experts testifying on subjects requiring special knowledge, skill, or learning, but includes the evidence of common observers, testifying to the result of their observation, made at the time, in regard to common appearances or facts, and a condition



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of the instructions given, and to the judgment of the court on the motion to set aside the verdict as contrary to the evidence. To the determination of these questions it is of course necessary that the evidence presented to the court below should be before us by proper bill of exceptions.

The case was tried and a verdict rendered on the 28th day of November, 1907. Upon the rendition of the verdict the defendant moved the court to set it aside upon numerous grounds, which need not be more specifically stated than that, except the already disposed of, they all depend upon the evidence.

Upon this motion the following order was entered: "The court not being advised of its judgment on motion to set aside the verdict doth take time to consider, and the following consent of parties is entered of record, to-wit: It is agreed that the plaintiff and defendant may present to the judge of this court bills of exceptions to the rulings of the court during this term, as either party may desire within sixty days from the 28th day of November, 1907, to be signed, sealed and made a part of the record with the same force and effect as if the said bills of exceptions were presented to the court and signed during the present term, November, 1907, and this consent is to be entered of record." Which was accordingly done.

It will be observed that no judgment was rendered upon the motion. The whole matter was, therefore, still within the power of the court with full power, regardless of the consent of parties, to sign such bills of exceptions and enter such judgment as might be proper.

At the March term of court, on the 20th day of the month, the following order was entered: "This day came again the parties by their attorneys, and the court having maturely considered the motion of the defendant made at the last term of court, to set aside the verdict of the jury and grant a new trial for reasons fully set out in the order made in this case at the last term, is of opinion and doth decide that there is no legal ground upon which to set aside said verdict, doth over-



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action of the defendant in error the circuit court entered an order certifying the evidence *nunc pro tunc*. Defendant in error filed its bill of exception to this action upon the part of the circuit court.

We are of opinion that an exception was unnecessary, because the want of power in the court to enter such an order appears upon the face of the record.

The contention of plaintiff in error upon this point is that the courts have possessed and exercised the power to make *nunc pro tunc* entries in proper cases from the earliest times, where it was necessary to prevent injustice to suitors; that it may be done where a court has ordered a judgment, which the clerk has failed or neglected to enter in the record, even after the term at which it was rendered has passed. Citing 4 Am. St. & L. 828, and Freeman on Judgments, sec. 56.

The trouble is that this argument, if sound, proves too much, for the contention, if sustained, would practically abrogate the rule upon the subject of bills of exception.

In *Wallahan v. People*, 40 Ill. 104, it is said: "An amendment of a bill of exceptions incorporating evidence alleged to have been omitted from the original bill of exceptions should not be allowed at a term subsequent to that at which the trial was held, unless there is something in the record to amend by."

Now in the case before us, there was nothing in the record by which an amendment could be made—no note or memorandum of evidence introduced; for to say that there was a memorandum of the evidence introduced would be to assume the existence of the very fact which is to be established—that is to say, that there is a memorandum which correctly states the evidence introduced before the jury.

In *Tracy's Adm'r. v. Carver Coal Co.*, 57 W. Va. 587, 50 W. Va. 825, it was held that where a skeleton bill of exceptions had been prepared, as in our case, the judge of the court, on motion of the exceptor, could not, two years afterwards, undertake to certify the evidence and complete a bill of exceptions,

















## Opinion.

Kansas and shortly before the institution of this suit died there. His administrator brings this suit, and in their answer the defendants formally admit the accuracy of the settlements made by which the amount of the notes was fixed.

"The testimony by which the mutual mistake is sought to be proved is N. W. Solenberger's deposition, who, in his answer to the 113th cross-question, states he had never discovered it until his attorneys called his attention to the discrepancy. He cannot identify the items which entered into the settlement. He again and again reiterates that he does not know whether his individual liability to the firm of Wall & Co. was an item or not. All that he pretends to swear to is that he did not owe Strickler anything for his share of the amount owed by Wall and himself, and perhaps, but he thinks not, the individual debt which he owed Wall & Co. We are left to conjecture, to grope in the dark, as to the settlement of 1888, and to similarity of figures and results, first, to furnish the items of a settlement, and, second, to show a mutual mistake.

"It is not sufficient to show a possibility or even a probability of mistake. It must be shown by the 'clearest and most satisfactory' evidence. *Foster v. Rison*, 17 Gratt. 340; *Neff v. Wooding*, 83 Va. 432, 2 S. E. 731; *Persinger v. Chapman*, 93 Va. 349, 25 S. E. 5; *Donaldson v. Levine*, 93 Va. 472, 25 S. E. 541; *Snyder v. Grandstaff*, 96 Va. 480, 31 S. E. 647, 70 W. Va. 10, 11, 56 S. E. 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

"In *Persinger v. Chapman*, *supra*, a bond was given in settlement, and it was claimed a mutual mistake was made. The court says, what also very aptly applies to this case: 'Equity will not extend its aid to one who has been guilty of culpable negligence. It requires that the party who asks relief on the ground of mutual mistake shall have exercised at least the degree of diligence which may fairly be expected from a reasonable person, and it has frequently been decided that equity will not relieve against mistake when the party complaining has

Opinion.

means of ascertaining the true state of fact  
 induced thereto by the other party neglect  
 opportunities of information.'

deas are correct, in 1891, prior to the co  
 at \$1,500, he owed Strickler, principal a  
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Opinion.

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"We agree to take out fire insurance in the amount of \$70,000, loss, if any, payable to Mr. Walter H. Taylor, trustee, as his interest may appear.

"It is understood that we are to pay all recording fees, and the expense of your general counsel in the preparation of all documents.

"Yours very truly,  
"VICTORIA HOTEL CORPORATION,  
"By ALAN G. BURROW, Secretary."

"February 1, 1907.

"Alan G. Burrow, Esq., Secretary,  
"Victoria Hotel Corporation,  
"Norfolk, Va.

"Dear Sir:

"In reply to your letter of January 29, 1907, making application for a loan of \$70,000, upon the terms and conditions stated in said letter, with the subsequent addition of the names of Ferguson & Calrow, as endorsers of the eight thousand dollar note mentioned in said letter, I now beg to advise that said letter of application has gone before our several committees, and has by them been approved, and I am authorized to pay to your company the \$8,000 therein mentioned.

"There is a condition which our executive committee desires to be stipulated in their acceptance of your proposition, viz.: That the \$15,000 sinking fund shall be paid as follows: \$5,000 not later than October 1, 1907; \$5,000 not later than November 1, 1907; and \$5,000 not later than December 1, 1907.

"It was understood with you that these conditions would be acceptable to your corporation, and that the minutes of your stockholders' meeting, and the minutes of the subsequent meeting of your board of directors, shall embrace said change.

"Yours very truly,  
"R. W. GAMBLE, Secretary."



### Opinion.

completion of the building and the hereon, stated in the letter of the bond from April 15 to May 1, 1907. In February, 1907, the bond sued on was one of the formal portions, is as follows: The above obligation is such, that Union Trust and Title Corporation to the Victoria Hotel Corporation the sum of (\$70,000.00) evidenced by seventy (\$1,000.00) each, payable on or before the first day of February, 1907, and thereafter at the rate of six per centum per annum, the interest being evidenced by bonds, all of the said bonds and interest of trust upon the property of the Victoria Hotel Corporation situated on the south side of Main street in Norfolk, Virginia, between Loyall's lane and the alley having a frontage on Main street of 148.6 feet with a depth on Loyall's lane of 148.6 feet and a width in front of the alley of 118.6 feet and a width in rear of more or less; and the conditions of the said loan from the Victoria Hotel Corporation to the said Victoria Hotel Corporation will be erected on said property on or before February 1, 1907, at a cost of not less than \$90,000 in compliance with the plans and specifications of the architect & Calrow, under which the same is to be erected free from all material, labor and

f the building as above described shall  
d by the Victoria Hotel Corporation  
.00, on or before the 1st day of May, 19  
n all material, labor and mechanic's li

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Opinion.

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then this obligation shall be void, otherwise to remain in full force and virtue."

One of the contentions of the plaintiff in error is that the agreement or contract described or recited in the bond is materially different from the contract between the lending and borrowing companies, in several particulars. The bond recites that the lender had agreed to loan to the borrower the sum of \$70,000 for *one year with interest at the rate of six per cent. per annum, payable semi-annually*, when in fact the contract of loan provided for the payment of *six per cent.* interest for the use of the money loaned, for a commission of \$1,400 in cash for making the loan, and for the repayment of \$15,000 of the money loaned, before the expiration of the year for which it was loaned, and \$8,000 of the \$70,000 to be loaned had already been secured by the hotel corporation.

The legal effect of the actual contract between the parties was not a loan of \$70,000 for one year at *six per cent.* interest, payable semi-annually, but a loan at *eight per cent.* interest (for the commission of \$1,400 was nothing more than interest—3 Parsons on Contracts, 106-108, 113-115; *Brakeley v. Tuttle*, 3 W. Va. 86, 130-137; *Meem v. Dulaney*, 88 Va. 674), one-fourth of which was payable when the loan was made, and for a repayment of more than one-fifth of the money loaned several months before the expiration of the year for which the loan was made, and the \$70,000 to be loaned embraced \$8,000 for which the hotel corporation was then indebted.

The contract for the loan and that recited in the penal bond was materially different, and the lender knew this, for the bond was prepared by its counsel. It does not appear that the plaintiff in error knew that the contract between the lender and borrower was different from that recited in the bond, and such knowledge is denied by it.

The undertaking of the surety was that the hotel building should be erected and completed by the hotel corporation at a cost of about \$90,000 on or before the 1st day of May follow-



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been entered into at all, or, being entered into, the extent of the surety's liability might be thereby increased, the surety is in such case generally held to be not bound by his obligation."

In 1 Chitty on Contracts (11th Am. ed.), pp. 772-3, it is said that "although a surety is not of necessity entitled to receive, without inquiry, from a party to whom he is about to bind himself a full disclosure of all dealings between the principal and that party, still if any material part of the transaction is, with the knowledge of the creditor, misrepresented to the surety, or if the creditor fraudulently conceal from the surety any circumstance within his knowledge, which it is material for the surety to know, although such concealment be not with a view to any advantage to himself, the guaranty will be void."

In the note to *Rees v. Berrington*, 2 White & Tudors Lead. Cases, Pt. 2, p. 1867, after stating that the intimate relation between the parties to the contract of suretyship requires that perfect good faith should be adhered to, the rule is laid down as follows: "Wherever, therefore, with the knowledge or assent of the creditor, there is any misrepresentation to, or even concealment from, the surety, with regard to any material fact which had he been aware of he might not have entered into the contract of suretyship, it will thereby be rendered invalid, and the surety will be discharged from his liabilities."

To the same effect, substantially, are 3 Min. Inst. 186; 2 Am. Lead. Cas., 478-479; Bayless, p. 214; DeColyer, p. 374, in their books on Sureties and Guaranties.

The doctrine as announced by the text-writers seems to be fully sustained by the decided cases.

In the case of *Stone v. Compton*, 5 Bingham (N. C.) 142, the recitals of the various instruments read at the execution of the note were so worded as to convey the impression that the principal would actually receive the whole amount named, whereas a considerable portion of it was to be retained on account of an antecedent debt. It was held in that case that this



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itor and the hotel corporation for their own convenience. It was without consideration, and there was nothing in it to prevent the hotel corporation from demanding and receiving the money loaned at once; certainly it was no such binding legal contract changing the character of the surety's undertaking as would relieve it from liability on the bond.

Without discussing specially the other grounds relied on to discharge the surety from liability, it is sufficient to say that neither of them are sufficient for that purpose, and the trial court properly so held.

The judgment complained of must be reversed, the verdict of the jury set aside, and the cause remanded for a new trial to be had not in conflict with the views expressed in this opinion.

*Reversed.*

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Statement.

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**Staunton.**

**BEDFORD CITY v. SITWELL.**

September 9, 1909.

**ISSUES—Defective Sidewalks—Negligence of Municipal corporations,** while not insurers of the safety of streets and sidewalks, must exercise reasonable care to maintain a safe condition for travel in the ordinary manner. A person injured in damages for their failure so to do to one, using and exercising ordinary care, is injured by their negligence. But to render the municipality liable for an accident, it should have been using reasonable or ordinary care to prevent the accident.

**ISSUES—Sidewalks—Safe Condition—Presumption of Defects—Case at Bar.**—A person using a street in the ordinary manner has the right, in the absence of evidence to the contrary, to assume that the street or sidewalk is in a reasonably safe condition, and is not, as a matter of course, liable to be on the lookout for defects or obstructions. A person who has knowledge of the defective condition of the sidewalks, and especially when he is not using them in the ordinary manner in which they are ordinarily used, or intended to be used, cannot of course assume that they are in an unsafe condition, and act upon that assumption. In the case at bar, the plaintiff knew of the defective condition of the sidewalk, and, although not specially at the place of accident, she should have used reasonable care and diligence for her own safety in the use made of the sidewalk, and hence cannot recover.

Judgment of the Circuit Court of Bedford county is affirmed. Judgment for the plaintiff is reversed.

*Reversed.*

affirms the case.

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*Wm. R. Abbot, Jr., and Harrison & Long*, for the plaintiff in error.

*S. S. Lambeth and Sale & Withers*, for the defendant in error.

BUCHANAN, J., delivered the opinion of the court.

This is an action to recover damages for personal injuries suffered by the defendant in error, Mrs. Sitwell, while attempting to get out of her carriage on to a board sidewalk in the town of Bedford City.

There was a demurrer to the evidence, which was overruled, and judgment rendered for the plaintiff. To that judgment this writ of error was awarded.

Three grounds of error are assigned: First, that the evidence does not show that the town was guilty of negligence; second, that if it does, the plaintiff was guilty of contributory negligence; and, third, that certain evidence, as set out in bills of exception numbered from 1 to 5, was improperly admitted.

In the view we take of the case, it will be unnecessary to consider the first and third assignments of error.

The walk where the accident occurred is about two feet above the level of the street, and was constructed of boards about four feet long, nine inches wide, and one and one-half inches thick, laid on stringers three by four inches, running parallel with the street, and placed about two and one-half feet apart. The outside stringer, or the one nearer the fence, is laid on the ground, and the other rests upon braces. To these stringers the boards are nailed.

On the morning of the accident the plaintiff came in from the country in a carriage, and drove up to the side of the walk not far from the back gate of her sister's home on Grove street. In stepping from the carriage to the sidewalk the end of the board upon which she stepped gave down, the other end flying



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in the face, causing the injuries of

stringer farthest from where she stepped on the ground, was entirely decayed and weakened in that end of the board, and that it joined the board to the other stringer. It appears from the plaintiff's own testimony that she did not know that the particular board was in an unsafe condition for the purpose. She did know the general condition of the boards that there was danger from stepping on the boards; that boards had tilted up with her before, and they had with almost everybody in town. She knew them, so that her habit in stepping was to step well up on the stringer so as to avoid the danger from tilting or flying up; that on the particular occasion she had no recollection of how she stepped, but she supposed that she did so in her usual manner.

That she was exercising her usual care in stepping on the board, and that she was injured, is clear from her answers to the questions asked her on cross-examination: "I stepped from your vehicle on the plank, I tried to mind to step over to avoid the plank flying up, I don't think about it."

A. It was muddy and I pulled up to the curb and handed him — upon the plank without taking any thought of it. "Yes."

The city owns and is charged with the duty and responsibility of keeping their streets and sidewalks in repair, and for the safety of their streets and sidewalks, they exercise reasonable care to keep them in a safe condition for the ordinary modes, and are liable in damages for negligent failure to do so to one who, with the exercise of ordinary care, is injured by the failure.

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traveling and exercising ordinary care, is injured by reason of their negligence. See *City of Richmond v. Courtney*, 32 Gratt. 792, 799; *Moore v. City of Richmond*, 85 Va. 538-9, 8 S. E. 387; 2 Dillon on Mun. Corp. (4th ed.), sec. 1119.

But in order to make the city liable it is necessary "that the plaintiff should have been using reasonable or ordinary care to avoid the accident; or, in other words, he must be free of any such fault or neglect on his part as will in actions for negligence defeat a recovery." 2 Dillon on Mun. Corp., sec. 1020. *City of Richmond v. Courtney*, *supra*; *Winchester v. Carroll*, 99 Va. 728, 743-4, 40 S. E. 37.

It is also settled law that a person using the street or sidewalk in the ordinary manner has the right, *in the absence of knowledge to the contrary*, to act on the assumption that the street or sidewalk is in a reasonably or ordinarily safe condition, and is not as a matter of law required to be on the lookout for defects or obstructions. See 28 Cyc. 1419-20; 2 Dillon Mun. Corp., sec. 1007; *City of Richmond v. Courtney*, *supra*, 792, 800-2; *City of Winchester v. Carroll*, *supra*, 743-4.

But where he has notice of the defective condition of the street or sidewalk, and especially where he is using them not in the manner in which they are ordinarily used or intended to be used, he cannot of course assume that they are in an ordinarily good condition and act upon that assumption. In such a case he must exercise care and prudence in proportion to the danger from the known defect and the different use to which he is putting the street or sidewalk. See same authorities.

In this case, as we have seen, while the plaintiff did not know that the board upon which she stepped was not properly fastened, she did know that many boards on the sidewalk were loose and would tilt or give way if she stepped upon them outside of where they rested upon the stringer; yet, notwithstanding this knowledge, she drove up to the sidewalk, not at a crossing, and on the side next to the street where it was about two feet higher than the street, and stepped from the vehicle upon the end of

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ed her, without exercising any care either  
stened to the stringer, or by stepping upon  
ers, or where it rested upon the stringer  
f these precautions would have prevented  
er knowledge of the condition of the side-  
however negligent the town may have been  
its duty, the plaintiff failed to exercise  
ich, according to her own testimony and  
ze of the case, the law made it her duty

d diligence on her part would have pre-  
Where the plaintiff has failed to exercise  
this, there can be no recovery. *City of*  
, *supra*, pp. 800-801.

therefore, that the judgment of the cir-  
versed, the demurrer to the evidence sus-  
entered in favor of the defendant corpo-

*Reversed.*

Statement.

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**Staunton.**

VIRGINIA AND KENTUCKY RAILWAY CO. v. HENINGER.

September 9, 1909.

1. **CONTRACTS—*Ambiguous Language—Practical Construction.***—Where the language of a contract is ambiguous, the practical construction placed upon it by the parties is entitled to great consideration, especially when the data for any other construction is not at hand and cannot be procured.
2. **APPEAL AND ERROR—*Commissioner's Report—Exceptions.***—Objections to the report of a commissioner in chancery, on account of errors not apparent on its face, cannot be made for the first time in the appellate court.
3. **APPEAL AND ERROR—*Commissioner's Report—Conflict of Evidence.***—Where the evidence is conflicting, the findings of a commissioner in chancery on a question of fact approved by the trial court, will not be disturbed on appeal unless they are clearly wrong.
4. **CONTRACTS—*Performance—Acceptance of Work.***—Although work is not completed in all respects according to contract, objection cannot be made on that account if the work was accepted as in fulfillment of the contract.
5. **CONTRACTS—*Time of Performance—Extension.***—Changes made as to work to be done after a contract is entered into, which require more work, entitle the contractor to more time in which to do it.

Appeal from a decree of the Circuit Court of Wise county.  
Decree for the complainant. Defendant appeals.

*Affirmed.*

One of the questions which arose in the case was as to the amount of material removed and its proper classification, and as the testimony of the engineers introduced by plaintiff and defendant was conflicting, both as to yardage and classification, the case on this point was referred to J. P. Wolfe and Malcolm Smith (who are engineers), commissioners, who filed their report, to which there were exceptions.

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*ars & Perry*, for the appellant.

*m. H. Werth*, for the appellees.

ed the opinion of the court.

nto a contract with the appellee for the  
railroad in Wise county. One of the  
it is as follows:

ntucky Railway Company binds itself  
the work mentioned above as follows:  
nts per cubic yard; for all loose stone  
e yard; and for all solid stone removed.

The measurement of all stone and  
contract is to be made in the fills and  
ame is removed."

d is to the construction placed by the  
sentence of the language quoted.

at the quantity of earth and stone re-  
ied by measurement in the borrow pit  
ord "fills" was used by the mistake of  
he word "cuts." The appellee, on the  
t the quantity of earth and stone re-  
ned by measurement of the fills, and

ie progress of the work the difference  
the meaning of the contract upon the  
t arose. The appellant prepared an  
nt, making clear its contention as to

but the appellee declined to sign it.  
antity of earth and rock moved was  
, and it was so measured, or attempted  
e appellant's engineer.

ear, in the light of the facts and cir-  
he parties when the contract was made,

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what method of measurement was intended. The contract being ambiguous, the practical construction placed upon it by the parties was entitled to great consideration, especially as the commissioners taking the account in the case report that the measurement as contended for by the appellant has never been and cannot now be made, and we cannot say that the trial court erred in adopting that construction. *Knick v. Knick*, 75 Va. 12, 20; *Kiawell v. B. & O. R. Co.*, 11 Gratt. 676; *King v. N. & W. Ry. Co.*, 99 Va. 625, 39 S. E. 701.

The next assignment of error is that "Even if the contract could be construed as providing for measurement in the fills, the court erred in failing to allow for the shrinkage of earth."

The question of the quantity of earth and stone in the fills was one of the questions referred to the commissioners who took the account in the case, and they reported upon it. The appellant filed no exception that their finding upon that point was erroneous. If there was error in failing to allow for the shrinkage of earth in measuring the fills, it is not apparent on the face of the report, and an objection on that ground cannot be made for the first time in this court. *Osborne v. Big Stone Gap Colliery Co.*, 96 Va. 58, 66, 30 S. E. 446.

The action of the court in allowing solid rock prices instead of earth prices for the borrow pit at the tipple of Bond & Bruce is assigned as error.

The evidence of the engineers shows that it is the duty of the resident engineer to locate the borrow pits, and that it is the duty of the contractors to do the work as economically as possible. The evidence is conflicting as to whether the work done and the circumstances under which it was done entitled the appellee to solid rock or earth prices for removing the material from the borrow pit in question. The commissioners were of opinion that the appellee was entitled to solid rock prices and so reported. The court approved their finding. It not being clear upon all the facts and circumstances of the case that the commissioners and the trial court reached an erroneous con-

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clusion, this court will not reverse it. *Shipman v. Fletcher*, 91 Va. 473, 478, 22 S. E. 458.

The next error assigned is the refusal of the trial court to allow the appellant "\$600.00 claimed for the failure of the plaintiff to finish the road according to the contract."

The preponderance of evidence is that the work was not finished in all respects according to contract; but it is equally clear, we think, that the appellant being anxious to lay its rails accepted the work as it was turned over to it, and that its contention that the appellee agreed to do further work upon it after the track was laid is not satisfactorily shown. This assignment of error cannot, therefore, be sustained.

The remaining error assigned by the appellant is that the court erred in failing "to allow the defendant the sum of \$325.00, resulting from the failure of the plaintiff (appellant) to finish the road within the time prescribed by the contract."

The road was not finished within the time provided for by the contract, but changes were made as to the work to be done after the contract was entered into, which required more work and necessarily gave the appellee the right to further time. We cannot say that the court erred in refusing to allow the claim or any part of it.

The appellee, under Rule VIII, assigns cross-errors. Without discussing in detail these assignments of error, it is sufficient to say that from a careful examination of the record we are of opinion that they cannot be sustained, and that the decree appealed from should be affirmed.

*Affirmed.*

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Statement.

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**Richmond.**

BALTIMORE AND OHIO RAILROAD CO. v. LEE.

November 18, 1909.

Absent, Buchanan, J.

1. RAILROADS—*Personal Injury—Contributory Negligence—Case at Bar.*

A brakeman of a railroad company who is seated in a place of safety in a coach, with no duties to perform until the coach is attached to a train, and who knows that the train of another company which usually attached the coach is being backed in to couple on to the coach and who hears its approach, but needlessly and carelessly steps out onto the platform just at the instant of impact and is knocked off and injured in consequence of the violence of the impact, is guilty of such contributory negligence as bars any recovery for his injuries. The doctrine of the "last clear chance" has no application to such a case.

2. RAILROADS—*Rules Dispensing with Signals on Yards.*—The rules of two railroad companies occupying a joint yard that, in making up and shifting trains in the yard, there need be no white light displayed on the front of the leading car at night, nor any flagman with a signal, are reasonable, and will be upheld.

3. RAILROADS—*Yards—Dispensing with Signals—Notice to Employees.*

It is unnecessary to ring a bell, sound a whistle or display a light in order to give employees on a railroad yard warning of dangers with which they are already acquainted, and of which they have knowledge.

Error to a judgment of the Circuit Court of Rockingham county in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

*Reversed.*

The opinion states the case.

*Bumgardner & Bumgardner*, for plaintiff in error.

*D. O. Deckert and C. R. Winfield*, for defendant in error.



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CARDWELL, J., delivered the opinion of the court.

This case was before us on a former occasion, when the judgment of the circuit court in favor of the plaintiff for \$3,150 damages was reversed, and a new trial ordered, because of misdirection of the jury in the trial court's instructions. *B. & O. R. Co. v. Lee*, 106 Va. 32, 55 S. E. 1.

At the second trial the evidence was practically the same as at the first, and the defendant demurred thereto, in which demurrer the plaintiff joined, and the court, ruling in favor of the plaintiff on the demurrer to the evidence, entered judgment for the amount of the damages, \$3,000, found by the jury, and to that judgment this writ of error was awarded the defendant company.

Of the bills of exceptions taken at the trial, six relate to the admission or exclusion of evidence over the objection of plaintiff in error, and the seventh to the refusal of the court to set aside the verdict of the jury because of improper remarks addressed by counsel for defendant in error to the jury with respect to the *quantum* of damages they should find, etc. In our view of the case it is unnecessary to consider these exceptions.

Modifying the statement of facts in the petition for this writ of error to meet the only objection made thereto by counsel for defendant in error, it is as follows:

"The accident occurred in the Southern Railway Company's yards in the town of Harrisonburg about 8 o'clock in the evening of September 10, 1904. The train crew of the defendant were engaged in the operation of backing an engine and heavy train of freight cars on to a siding known as the 'delivery track,' in order to deliver certain cars which were to go through to Strasburg to the Southern Railway Company. Standing on this siding or 'delivery track' was a 'combination' coach (i. e., a coach with one-half cut off and used as a baggage car and the other half fitted up for the accommodation of passengers) belonging to the Southern Railway Company. This coach had

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been left by its crew in a position so close to the end of the siding that the defendant's cars could not be pushed in on the delivery track without striking it and pushing it back. Lee was a brakeman of the Southern Railway Company, and had to let in the Southern engine to take up this train after the defendant's crew had delivered the cars on the siding. For something like half an hour Lee had been seated in that coach waiting for defendant's train to come into Harrisonburg, and, coming out on the platform of the coach nearest the approaching train just about the time the train came in contact with the coach, he was knocked off of the platform on to a pile of loose cinders banked up alongside of the delivery track, and his foot either slipped under the wheels of the moving train, or was crushed between the bank of cinders and the axle-boxes of the wheels.

"The Southern Railway runs into Harrisonburg from the north, and the Valley Railroad, which is operated by the Baltimore and Ohio Railroad Company, from the south. The tracks join about the center of the town, where the Kratzer Road crosses, but there is no break in the physical continuity of the tracks. In other words, there is a single continuous line of main track running through the town and crossing the Kratzer Road, but the tracks north of that crossing, running to Strasburg, belong to the Southern Railway Company, while the tracks south of that crossing, running to Lexington, belong to the Valley Railroad Company, and are operated by the defendant.

"Both roads use the same freight and passenger depots. The passenger depot belongs to the Valley Railroad Company, and is situated south of the Kratzer Road crossing. The freight depot and yards belong to the Southern Railway Company, and are north of the crossing. The Southern trains run over the Baltimore and Ohio tracks to receive and discharge passengers at the passenger depot; while the Baltimore and Ohio trains use the yards of the Southern Railway Company, and run over its tracks to receive and discharge freight at the freight depot.

"In the Southern Railway yards there is a switch or spur

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track leading off from the south side of the main track, and extending southward alongside of the main track and only a few feet from it, which is called the 'delivery' track. At the point where the delivery track has diverged sufficiently from the main track to admit of cars passing without striking is the 'clearance post.' This clearance post is 155 feet from the switch at the end of the delivery track, and the north end of the coach on which Lee was stood about twenty-five feet south of this post, making it about 180 feet from the north end of the coach to the switch.

"The Southern Railway Company ran an 'accommodation' train (i. e., a freight train with this accommodation coach attached for the transportation of passengers and baggage) from Strasburg to Harrisonburg in the morning, and Lee was a brakeman on this train. It was the custom to place this combination coach on the delivery track or siding when the train came in the morning and allow it to stand there during the day until made up in the train going out at night, the idle coach being used during the day by the crew as a 'caboose' car for storing their tools and overalls in. . . . This train was No. 274 of the Southern.

"The Baltimore and Ohio Railroad Company ran a freight train with a passenger coach attached from Lexington to Harrisonburg, which was due to arrive at Harrisonburg at 7 o'clock in the afternoon, known as No. 44. After discharging its passengers at the passenger depot this train would be run down on the main track, passing the line of division, on to the Southern Railway tracks, and passing within a few feet of this stationary coach standing on the delivery track, until it had pulled down clear of the switch—the crew cutting loose the passenger coach and way-car on the rear, which would run back along the main tracks to the Baltimore and Ohio tracks by gravity—then the Baltimore and Ohio train, with the engine pushing it, would back on to this delivery track, coupling to this stationary coach standing there, and continue to push back until

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the car nearest the engine of those to be delivered was clear of the clearance post. Then the train was stopped, the cars to be delivered were cut loose, and the defendant's engine and tender with the other cars not to be delivered pulled out of the delivery track, past the switch onto the main track, and then backed onto the defendant's own tracks.

"Strictly speaking, the defendant's crew only had to place the cars to be delivered to the Southern on the delivery track, and it was the duty of the Southern crew to leave the switch clear. The custom appears to have grown up for the Southern crew to leave the coach about opposite the engine-house, which stood some fifty or sixty feet south of the clearance post and 200 feet from the switch, and for the Baltimore and Ohio crew to make the coupling of these cars to that coach, thereby saving extra shifting to the Southern crew in making up their train, as this coach was to go out as the rear car of the train when made up. If, when the car was struck, the coupling was made, the train did not stop—only slowed up before actually coming in contact with the coach—and simply continued to push it back until all of the cars to be delivered were within the clearance post. The coach on this occasion was standing with its rear end about opposite the front of the engine-house, and its front end from fifteen to twenty-five feet inside of the clearance post.

"After these cars were placed on the delivery track and defendant's engine had pulled out of the switch, the cars so delivered were inspected by the proper officer of the Southern Railway Company—an operation which took about half an hour—and if all found in proper condition and accepted, the signal was given and the Southern engine was let in on the delivery track with the balance of the train, coupled up to said cars, thus completing the Southern train, which so made up was taken out to Strasburg. It was Lee's duty to let in this engine.

"Lee was on duty as a brakeman on this Southern train. On this occasion he was front brakeman. On the morning of the

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accident he had come down with this train from Strasburg, and was to go back with it in the evening. He was off duty from the time the train came down in the morning until 6 o'clock in the afternoon, at which hour he was required to report back for duty. This train was due to leave for Strasburg at 7 o'clock in the evening, but was required to wait for the arrival of the Baltimore and Ohio train, as it could not be made up until the through cars were delivered. On this particular occasion the Baltimore and Ohio train was about an hour late in arriving from Lexington, so that the train was being made up about 8 o'clock instead of at 7 o'clock as ordinarily.

"The train of cars was approaching the coach on a down grade, and the train consisted of engine and tender and twenty-two freight cars.

"This particular operation of delivering and transferring cars had been conducted in the same manner for many years. Lee had been on this particular run for about a week, but had seen the operation time and again, both in the daytime and at night, and was perfectly familiar with all of the details and with the locality.

"While Lee was technically on duty from the hour of 6 o'clock on, in that he was required to report and be ready for duty at that hour, as front brakeman he had no physical act of duty to perform with reference to that train until after the entire operation was concluded, the cars delivered had been inspected, and the defendant's train pulled out of the delivery track, at which time it became his duty to open the switch and let in the Southern engine to make up their train."

The defense made to the action at the last, as well as at the first, trial was that defendant in error had himself caused the injury he received by his careless and negligent act in stepping out upon the platform of the combination car, in which he was waiting for his work to commence, at the instant that the in-backing train upon the delivery track collided with the car, and this court has ruled upon substantially the same evidence now

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before us that there was no proof, or evidence tending to prove, that plaintiff in error had any opportunity, after defendant in error's act, to avoid the injury to him. In other words, upon the evidence, considered under the familiar rule governing its consideration, this court has adjudicated that the doctrine known as the "last clear chance" has no application to the case.

*B. & O. R. Co. v. Lee, supra.*

The rules of both the Baltimore and Ohio Railroad Company and the Southern Railway Company, in force when this accident occurred, provided that in making up and shifting trains in yards there need be no white light displayed on the front of the leading car at night, nor any flagman with a signal, and the reasonableness of these rules has been sanctioned by this and other courts as well as by law writers (*Pittard v. N. & W. Ry. Co.*, 107 Va. 1, 57 S. E. 561; *N. & W. Ry. Co. v. Belcher*, 107 Va. 340, 58 S. E. 579; *Aerkfetz v. Humphreys*, 105 U. S. 418, 36 L. Ed. 758, 12 Sup. Ct. 835; Elliott on Railroads, sec. 1258); therefore, it would be needless to discuss the question whether or not the accident to defendant in error was alone caused by the failure to ring a bell, sound a whistle or display a light upon the front car of the train backed in on the "delivery track" to be coupled to the combination car in which he was sitting, and to the front platform of which he went just as the shifting train came back upon the car, since he admits, as he was bound to do under the facts and circumstances proved, that he actually heard the backing train approaching. He says: "I heard the train running back, but I didn't think it was so close."

As said by Keith, P., in *N. & W. Ry. Co. v. Belcher, supra*, in dealing with similar facts and circumstances: "It cannot be that, under these circumstances, the defendants were compelled to send some men in front of the cars for the sake of giving notice to employees, who had all the time knowledge of what was to be expected."

Conceding, however, for the sake of the argument only,

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that the jury would have been warranted in finding, upon the evidence, that plaintiff in error was guilty of negligence in running the cars back upon the delivery track with too great force or speed, and without a light or signal upon the front car which was to be coupled to the combination car in which defendant in error was, and that this negligence contributed to the cause of his injury, the controlling question, in our view of the evidence, is, would the jury have been warranted in finding defendant in error not guilty of negligence contributing directly and proximately to his injury?

It is very true that defendant in error was not the employee of the plaintiff in error, but of the Southern Railway Company, and while it might have been considered negligence on the part of plaintiff in error to push its cars back on the delivery track with greater force than was necessary or usual, still defendant in error was not, by reason of his employment by the Southern Railway Company, or otherwise, relieved of the duty to exercise ordinary care for his own safety. He was entirely familiar, as he admits, with the uses made of the depot and yards at Harrisonburg in common by the two railway companies, of all the surroundings there, and of the dangers incident to the employment he had entered upon and continued, until he was as capable of discovering the dangers attending the operations in shifting cars in and out of the yards as anyone connected with the service of either company. In fact, at the last trial he admitted having made at the first trial the following answers to questions propounded to him:

"Q. How did you know that the B. & O. train was coming in there, Mr. Lee? A. I seen them pulling back down past the car, and they always did back in there.

"Q. Now, when you started to the door to go out, didn't you know that these cars with the engine behind them was being pushed up there to couple to that coach? Was not that what made you get up and start to the door? When you started to the door you knew those cars were backing up to the coach, is

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not that so? A. Yes, sir, I knew the cars were going to back up there.

"Q. Exactly; and that is the reason you got up and started to go to the door, is not that so? A. Yes, sir, I knew that they were going to back up there.

"Q. Don't a lot of freight cars, running along that track with an engine behind them, make a little fuss? They make a little more noise than a baby would crawling over a carpet? A. Yes, sir.

"Q. It makes some noise; but didn't it make a noise so that a man within a few feet of it could hear it? A. I could hear the train running.

"Q. Then when you stepped out on the platform, you could hear that train coming rumbling along towards you and close enough to bump you on that instant, and you didn't hear it? A. No, sir, I didn't hear it. I heard the train running back.

"Q. It is true you opened the door and stepped out on the platform? That is true? A. The door was open.

"Q. You didn't have to stop to open the door, but stepped out on the platform of the car; that is true, is it? A. Yes, sir.

"Q. And immediately you turned around and started to step off of the platform? A. Yes, sir.

"Q. But before you got off the platform the collision occurred; the cars came together; that is true? A. Yes, sir.

"Q. And you say you didn't hear that train coming there? A. I heard the train coming back, but I didn't think it was so close . . . It struck the car before I could step off.

"Q. When you stepped on the platform, didn't you hear that train coming? A. Yes, sir.

"Q. You heard the train coming along when you stepped on the platform? A. Yes, sir."

Practically the only modification he made at the last trial of the above statement is that the door of the car was shut as



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he was walking towards the end of the car next to the approaching train, and that he opened the door, turned back to get his lantern, and then stepped right out on the platform. The substance of his statement in this connection is that when he saw the Baltimore and Ohio train passing the combination car he was sitting in moving along the main track he knew that it would go up past the switch and then back in on the delivery track, to be there coupled to the combination car, and then taken out by the train of the Southern Railway Company later; yet he unnecessarily left his place of safety and went out upon the front platform of the car, and in such darkness that he could not see the backing train approaching. If it be true, as the learned counsel for the defendant in error argues, that the proof is that it was too dark for him to see the approaching train and there was too much noise about the yards for him to hear it, this would but accentuate the careless and negligent conduct on his part in needlessly going from a place of safety out upon the platform of the car.

It is quite clear from the evidence that the defendant in error carelessly and needlessly went out upon the platform of the combination car at a time when he not only had every reason to expect the train backing in upon the delivery track would reach the combination car, but actually heard the train approaching. He had not been ordered out, nor did any duty he had to perform require him to do this. In fact he could and should have remained in perfect safety until the cars brought in by plaintiff in error's train had been backed up to the combination car, and the engine that had backed them in had gone out upon the main track.

The evidence does not disclose a single act on the part of the servants and employees of plaintiff in error that would have caused injury to defendant in error had he, as was plainly his duty, exercised ordinary care for his own safety. As was said in the opinion of this court when the case was considered on the former occasion (*B. & O. R. Co. v. Lee, supra*):

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"It appears, without contradiction, that there was no appreciable interval of time, and no opportunity for the defendant, by the exercise of any degree of care, to have avoided the consequences of the plaintiff's act, between his going upon the platform and the accident." *N. & W. Ry. Co. v. Belcher, supra.*

The proof being that he needlessly put himself in the position he occupied when the accident to him happened, and that he simply neglected his own safety, there is no escape from the conclusion that the cause of his injury is attributed alone to his own careless and negligent conduct, for which, upon no principle of law or justice, could plaintiff in error be held liable in damages. *Cranes Nest Coal Co. v. Mace*, 105 Va. 624, 54 S. E. 479; *Chicago, &c., R. Co. v. Houston*, 95 U. S. 697, 24 L. Ed. 542, cited in *Marks v. Petersburg, &c., R. Co.*, 88 Va. 1, 3 S. E. 299, and *N. & W. Ry. Co. v. Wilson*, 90 Va. 263. See also *Jamison v. C. & O. Ry. Co.*, 92 Va. 327, 23 S. E. 758, 53 Am. St. Rep. 813; *Pittard v. So. Ry. Co., supra*; *N. & W. Ry. Co. v. Belcher, supra.*

The judgment of the circuit court must be reversed, and judgment entered here, upon the demurrer to the evidence, for plaintiff in error.

*Reversed.*

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**Syllabus.**

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**Richmond.**

BAUGHER v. HARMAN.

November 18, 1909.

Absent, Buchanan, J.

1. **AUTOMOBILES—*Fright of Horse—Negligence.***—The owner of an automobile who is running his machine in a careful manner, at a slow rate of speed, along a city street thronged with travelers and vehicles, and keeping a lookout to avoid accidents, is not liable for an injury inflicted by a horse taking fright thereat, when he was not aware of any danger from said fright until his machine had reached a point opposite to or had passed the horse's head, and then deemed it less dangerous to pass on than to stop, and when the horse was in charge of three able-bodied men, and there was nothing in its behavior to lead him to suppose that it would become unmanageable.
2. **AUTOMOBILES—*Fright of Horse—Emergency—Negligence of Plaintiff.***  
It is reasonable to presume that the fright of a horse will be increased by stopping an automobile just opposite to him, rather than by passing on by; and if the driver of the machine passes on he is not responsible for the damages inflicted by the horse where the emergency in which he was placed was occasioned by the imprudence of the plaintiff in undertaking to hitch the horse, which was "automobile shy," to a buck-board, in a crowded street, when there were other suitable places to hitch him in the immediate vicinity.
3. **NEGLIGENCE—*Burden of Proof—Degree of Evidence—Verdict.***—The burden of proving actionable negligence is primarily upon the plaintiff, who must establish it by affirmative evidence showing more than a mere probability of a negligent act. Its existence cannot be left entirely to conjecture, and the tentative conclusions of juries based upon no sure grounds of inference cannot be upheld. This doctrine is not in conflict with the rule that the verdict of a jury on a question of negligence ought

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not to be disturbed where the evidence is such that reasonable men may fairly differ as to whether or not there was such negligence.

Error to a judgment of the Circuit Court of Augusta county in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

*Reversed.*

The opinion states the case.

*J. M. Perry, R. S. Ker*, for plaintiff in error.

*Charles & Duncan Curry*, for defendant in error.

WHITTLE, J., delivered the opinion of the court.

This action was brought by the defendant in error, Harman, to recover of the plaintiff in error, Baugher, damages for personal injuries which are alleged to have resulted from the defendant's negligence.

The essential charges in the declaration are that the plaintiff was standing in front of a horse holding it by the rein, while the animal was being hitched to a buck-board by the owner and an assistant on Central avenue in the city of Staunton; that the defendant came along the avenue in an automobile, at sight of which the animal, being in plain view of the defendant, gave evidences of fright, and it was apparent that it was liable to run away and injure the plaintiff; that thereupon one of the men who was engaged in hitching the horse to the buck-board waved his hand in the direction of the defendant as an indication of danger, and it became the duty of the defendant to stop his automobile; yet the defendant, well knowing the plaintiff's danger, continued to advance. Whereupon the horse became uncontrollable and plunged forward, knocking the plaintiff down and pulling the vehicle over him, and inflicting the injuries of which he complains.

There was a verdict and judgment for the plaintiff, to which judgment this writ of error was awarded.

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The evidence tends to show: That Central avenue is one of the main thoroughfares of the city of Staunton, and that the accident occurred on court day, when it was thronged with travelers and vehicles; that the defendant, in company with his friend, Miller, was running his machine along the avenue in a careful manner and at a rate of speed estimated at from four to six miles an hour (well within the speed limit fixed by law), and was keeping a lookout to avoid accidents; that he did not discover the fright of the horse until he was in the act of passing it; that the animal was at that time shying, but was being held by two men, and did not become uncontrollable until after the automobile had gone by; that neither the defendant nor his companion saw the man wave his hand as a cautionary signal; that Miller observed that the horse gave indications of shying when they had approached to within "a little less than the width of the court room" from it, but the animal did not, at that time, manifest severe fright; that the horse was shown to be "automobile shy," but that fact was not known to the defendant at the time of the accident. Moreover, the evidence, we think, plainly shows that the defendant was not aware of the plaintiff's danger until his machine had reached a point opposite to, or had passed, the horse's head; and that even if he had discovered the animal's fright earlier he would have seen that it was in charge of three able-bodied men, and that there was nothing in its behavior to lead one to suppose that it would become unmanageable.

One of the alleged grounds of negligence relied on is the failure of the defendant to stop when the fright of the horse first became known to him; but it was not shown that stopping the machine at that time would have averted the accident. As a matter of fact, it is quite as reasonable to presume that it would have increased the animal's alarm. At all events, the emergency which confronted the defendant was not of his making, but was occasioned by the imprudence of the plaintiff and his companions in undertaking to hitch an animal, whose

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dangerous character was well known to them, to a buck-board in a crowded street, when it appeared that there were several hitching lots in the immediate vicinity.

The defendant testified to his actuating motive as follows: "I didn't stop then. If I had, it would have been worse, in my estimation, than to go on like I did; and I went on and stopped about forty or sixty feet, or something like that away, and got out of my car and went back. Mr. Harman was holding on to the horse's bridle, and I think the bridle broke, but I don't know what caused him to fall."

There were several assignments of error, but entertaining, as we do, the opinion that the defendant's negligence has not been established, it is unnecessary to discuss them. The principle which devolves upon a plaintiff the burden of proving primarily the existence of actionable negligence is well settled, and does not impugn the oft-repeated rule announced by this court, that the verdict of a jury on a question of negligence ought not to be disturbed where the evidence is such that reasonable men may fairly differ as to whether or not there was such negligence.

In *Northington v. Norfolk Ry., &c., Co.*, 102 Va. 446, 46 S. E. 475, it was held: "In an action to recover damages for an injury alleged to have been inflicted by the negligence of the defendant, the plaintiff must show more than a probability of actionable negligence on the part of the defendant. If there is no reliable, substantial evidence to support a verdict for the plaintiff in such an action, it should be set aside."

In *Norfolk & Western Ry. Co. v. McDonald*, 106 Va. 207, 55 S. E. 554, the court quotes with approval the proposition laid down in *N. & W. Ry. Co. v. Cromer*, 101 Va., 671, 44 S. E. 899, that "the existence of negligence must not be left entirely to conjecture, and courts cannot uphold the tentative conclusions of juries based upon no sure grounds of inference."

Judge Cardwell, in delivering the opinion of the court in the first-named case observes: "The burden is upon the plaintiff to make out her case, which is in the first instance to establish

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the negligence of the defendant company by affirmative evidence, which must show more than a mere probability of a negligent act. *Consumers' Brewing Co. v. Doyle's Admx.*, 102 Va. 399, 46 S. E. 390." See also *Berkley St. Ry. Co. v. Simpson*, 106 Va. 548, 56 S. E. 331.

In the interest of public safety, we fully appreciate the importance of a rigid enforcement of the law against the negligent operation of automobiles over the highways of the Commonwealth. At the same time, such consideration can afford no justification for mulcting the owners or drivers of such machines, either with damages or fines for inevitable accidents not due to their fault or negligence, yet to the happening of which they may have innocently contributed.

For these reasons we are of opinion that the circuit court erred in overruling the motion of the defendant to set aside the verdict of the jury as contrary to the law and the evidence, for which error the judgment must be reversed, the verdict set aside, and the case remanded for a new trial.

*Reversed.*

Syllabus.

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**Richmond.**

BROWN'S COMMITTEE v. WESTERN STATE HOSPITAL.

November 18, 1909.

Absent, Buchanan, J.

1. **APPEAL AND ERROR—Record—Parties—Effect of Former Decrees.—**

Upon an appeal to this court, the case must be heard and determined upon the record considered and passed upon in the trial court, and hence an agreement between counsel for the respective parties that, in order to determine the rights of all parties interested in the funds in the cause, it shall be heard and determined in this court as if certain persons who were not parties in the trial court were parties to the record, must be ignored. Nor will an agreement between counsel, as to the effect of a former decree entered in the cause, be considered.

2. **INSANE PERSONS—Action for Support—Liability at Common Law.**

The right of action against the estate of a lunatic for passed expenses incurred in supporting him in one of the State's hospitals exists only by the statute imposing a personal liability for such support. At common law no such right existed, in the absence of express contract.

3. **INSANE PERSONS—Action for Support—Remedy Withdrawn by Act of 1908.—**

The purpose and intent of the act of Assembly approved March 16, 1908 (Acts 1908, p. 687), was to declare that thereafter no claim, not reduced to judgment, for the maintenance and support of insane persons committed, before or after the passage of the act, to an insane asylum or hospital of the State, should be collected. The plain intent of the legislature was to deal alike with all citizens of the State committed to either of the several hospitals established for their care and comfort, and to put them all in the same class; and while the language of the act imports future operation and effect, it destroys the remedy for the recovery of such claim, deals fully with the subject, and expressly repeals all former acts or parts of acts in conflict therewith.

4. **ACTIONS GIVEN BY STATUTE—Effect of Repeal of Statute.—**

A right of action that did not exist at common law, but depends solely upon statute, falls with the repeal of the statute, without a



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saving clause, unless reduced to judgment. If pending such action, before judgment, the law which gave the right to sue is repealed, without a saving clause as to pending suits, no further steps towards judgment can be taken in such suits.

5. STATUTES—*Construction—Exemptions*.—A statute exempting property from levy or sale is not to be construed strictly, but to carry out the obvious intent of the lawmaker.
6. STATUTES—*Repeal by Implication—Support of Insane Persons in State Hospitals—Act of 1906 Repealed by Act of 1908*.—Where a later statute was plainly intended to embrace the whole legislation on the subject to which it refers, and to be wholly substituted for all former statutes on the same subject, it is a legislative declaration that whatever is embraced in it shall prevail, and whatever is excluded is discarded and repealed. In the case at bar the act of 1908 was intended to cover the whole subject of recovery of claims for the support of lunatics confined in the State hospitals and to repeal the act of March 10, 1906 (Acts 1906, page 189), on the same subject.

Appeal from a decree of the Corporation Court of the city of Staunton, in the chancery cause of *Baldwin's Adm'r v. Brown and Others* wherein appellee filed its petition. Decree for the petitioner. Defendant appeals.

*Reversed.*

The opinion states the case.

*Peyton Cochran and H. J. Taylor*, for appellant.

*Timberlake & Nelson*, for appellee.

CARDWELL, J., delivered the opinion of the court.

Upon an appeal allowed to this court the case has to be considered and determined upon the record considered and passed upon by the court from whose decision the appeal is taken, and, therefore an agreement between counsel for the respective parties that in order to determine the rights of all parties interested in the fund in the cause it shall be heard and determined in this appellate court as if certain parties who were not parties in the court below were parties to the record, has to be ignored.

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Nor will an agreement between counsel, as to the effect of a former decree entered in the cause, be considered.

J. Baldwin Brown was, on March 15, 1892, committed as an insane patient to the Western Lunatic Asylum, now by statute known as the Western State Hospital, at Staunton, Va. At the time of his commitment Brown owned no property. He was therefore entered as a State patient, free of charge, and had remained and was treated as such until the institution of this suit.

October 1, 1899, Mrs. Susan M. Baldwin died leaving a will in which she bequeathed a legacy of \$2,864 to be held in trust for her afflicted nephew "until his health should be restored enough for him to have the care of same, the income from said fund to be applied to his clothes and comfort in every way."

In a pending cause the Corporation Court of the city of Staunton, by its decree of January 15, 1900, construing the will of Mrs. Susan M. Baldwin, held as follows: "That the trustee of J. Baldwin Brown, constituted by the said will of Susan M. Baldwin, deceased, take the remaining one-half of the estate passing under the said will, and that the said trustee hold this last-named estate in trust for the said J. Baldwin Brown while he shall continue insane, and apply the income derived from said estate to the maintenance and support of the said J. Baldwin Brown; that whenever the said J. Baldwin Brown shall become of sound mind, that this trust shall end, and that he, the said J. Baldwin Brown, shall take absolutely, without any restriction or limitation whatsoever, the *corpus* of the entire estate held for him as aforesaid."

With the view of subjecting the trust fund held for said Brown under the will of his aunt to the payment of the cost of his maintenance from the time of his commitment as an insane patient until the filing of said petition, amounting to \$4,352.40, the Western State Hospital filed, on the 15th day of October, 1907, its petition asking that the income of the aforesaid trust fund be applied to the debt due the hospital;

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and, if at the determination of the trust the debt should not have been satisfied, that the *corpus* of the fund should be subjected to the payment of the balance due thereon.

Upon a reference to Master Commissioner Jos. A. Glasgow of said petition and the answer of Brown's committee thereto, the commissioner reported that, under the act approved March 10, 1906 (Acts 1906, p. 189), not only was the claim asserted by the hospital limited to five years next preceding the filing of its petition, making the debt due the hospital \$1,164, but that under the further provisions of that act the debt claimed to be due the hospital could not be enforced at all.

The Corporation Court, upon the hearing of the cause upon the master's report and two exceptions thereto, sustained the report insofar as it found that the claim of the hospital was limited to the five years preceding the filing of its petition, but overruled the report as to an exemption of \$2,000 to the estate of Brown, the lunatic, and as to the absolute exemption of the estate from payment of the claim of the hospital, because not sufficient for the support of an adult; and established the debt of \$1,164 against the estate of Brown to be paid from the surplus income of the trust fund which remains after the payment of such necessary expenses as clothes, trips, tobacco, etc., furnished Brown. It decreed further, that if the debt is not satisfied at the death of Brown, the principal of the trust fund shall be subjected to the residue thereof. From that decree the committee of Brown obtained this appeal.

In our view of the case the only question requiring consideration is, What was the effect of the act of the General Assembly approved March 16, 1908 (Acts 1908, p. 687), upon the right of the State to enforce a claim for support and maintenance of an inmate in either of its hospitals established and maintained for the care and treatment of insane citizens of the State?

It seems not to be controverted that no such right existed at common law, in the absence of express contract, but that the

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right of action against the estate of a lunatic for past expenses incurred in supporting him in one of the State's hospitals can exist only by statute imposing a personal liability for such support. The act of 1906, *supra*, gave the State no vested right, but merely provided a remedy or right of action against the estate of a lunatic committed to one of the hospitals of the State, in certain cases only. It provided expressly, as had not been theretofore, the various State hospitals with the means of collecting past-due charges for the maintenance and support of such patients as may have estates, but made this qualification: "except no claim shall be enforced or collected when the estate is worth less than two thousand dollars, nor where the estate is less than the amount necessary for the support of such insane person, or his or her immediate family, . . . and no statute of limitation shall run against any such claim or debt; provided, that no action or suit shall be brought or maintained for any part of any claim which has been due and payable for five years or more."

Here appeared the avowed policy and intent of the legislature, that the several State hospitals might collect past due charges for the maintenance and support of patients in their respective hospitals in certain cases—first, where the estate of the lunatic exceeded \$2,000, thus exempting that sum from liability in any event; and, second, where the estate was less than the amount necessary for the support of the insane person, or his or her immediate family, in either of which events no part of the estate was to be subjected to the claim of the hospital.

As observed, that statute only provided the means of collecting past-due charges for the maintenance and support of a patient in any of the several hospitals, and gave a right of action therefor upon certain conditions and limitations; but a different policy is unmistakably declared by the act of 1908, to-wit: that the estate or personal representative of a citizen of the State "committed to an insane asylum or hospital of the State" shall not be charged with any of the expenses attendant

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upon his commitment, or for his maintenance in the hospital to which committed, thus putting all of that class of unfortunates in the State entirely upon the same footing.

The act of 1908 is as follows: "1. Be it enacted by the General Assembly of Virginia, that an act entitled 'an act to provide for the expense of removing, supporting and maintaining insane persons—how paid,' approved March tenth, nineteen hundred and six, be amended and re-enacted to read as follows:

"Sec. 1. Be it enacted by the General Assembly of Virginia, That no citizen of the State of Virginia, who shall be committed to an insane asylum of the State, his estate or personal representative, shall be charged with any of the expenses attendant therewith, or for his maintenance therein.

"Sec. 2. All acts and parts of acts in conflict with this act are hereby repealed."

The act declared in its title its purpose, viz.: "to amend and re-enact chapter 115, Acts of Assembly, 1906-7, entitled 'an act to provide for the expense of removing, supporting and maintaining insane persons—how paid,' approved March 10, 1906," and it deals with the whole subject of providing for the expense of removing, supporting and maintaining insane persons, how paid, and amends the only existing statute upon the subject, viz.: the act approved March 10, 1906, *supra*, and concludes with an unqualified repeal of all acts or parts of acts in conflict therewith.

Unless this statute be construed as declaring the purpose and intent of the legislature to be that thereafter no claim should be collected for the maintenance and support of insane persons committed, before or after the passage of the act, to an insane asylum or hospital of the State, then we would have two classes of inmates in these several hospitals, the one required to pay for their support and maintenance under the act of 1906, and the other required to pay nothing, as provided by the act of 1908, a situation not lightly to be attributed to the legislature.

It was plainly the intent of the legislature, in the act of 1908, to deal alike with all citizens of the State committed to either of the several hospitals established for their care and

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comfort, to put them all in the same class, and where this is the case there is no ground for the charge of "denial of equal protection," enjoined by the Fourteenth Amendment to the United States Constitution. *Hayes v. Missouri*, 120 U. S., 68, 30 L. Ed. 578, 7 Sup. Ct. 350.

The effect of the statute was, as intended, to exempt the entire estate of a lunatic from sale, levy or charge for his support in an asylum or hospital for the insane citizens of the State, and not merely a part thereof.

"A statute exempting property from levy or sale is not to be construed strictly, but to carry out the obvious intent of the lawmaker." *Washburn v. Goodheart*, 68 Ill., 229, 13 L. R. A., 719; note 23 Am. & Eng. Ency. L., 399, and note 45 Am. Dec. 252.

It is very true that the words of the statute in question import future operation and effect, and it is also true that the rule is that statutes are always to be construed as prospective and not retroactive, as not intending to interfere with existing contracts, rights of action or vested rights, unless the intention that it shall so operate is expressly declared in the repealing act; but that rule has no bearing here. As remarked, the act of 1908 merely destroyed a remedy or right of action provided on behalf of the insane hospitals, which are institutions of the State, and there seems no room whatever to doubt that the State, through its legislative branch of government, had the right, the unrestricted power, to take away or discontinue the remedy or right of action provided in its own behalf in the act of 1906; and this was done by the act of 1908, fairly construed, and by the express repeal of all acts or parts of acts in conflict therewith, i. e., all acts or parts of acts theretofore enacted dealing with the subject legislated upon in the last act.

What would have been the status of the claim asserted in this case had it been carried into judgment against Brown, the lunatic, or his estate, before the passage of the act of 1908, is a question that need not be considered, as the act took effect before the entry of the decree here complained of.

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“The rights depending on a statute and still inchoate, not perfected by final judgment or reduced to possession, are lost by repeal or expiration of the statute.” Sutherland on Stat. Constr., sec. 163.

See also *Curran v. Ownes*, 15 W. Va., 108, in which the opinion says: “We think it well settled that the general rule is that when an act of the legislature is repealed it must be considered, except as to transactions past and closed, as if it never existed (*Ex parte McCardle*, 7 Wall., 514, 19 L. Ed. 264), and that a right of action that did not exist at common law, but depends solely upon statute, falls with the repeal of the statute, without a saving clause, unless that right has been carried into judgment. . . . That if pending such action before there is a judgment the law which gave the right to bring the suit is repealed, without a saving clause as to suits pending, no further steps towards judgment can be taken in such suits.”

The act of 1908 is to amend and re-enact the act of 1906 so as “to read as follows:” and both in its title and in the enacting clause, refers directly to the act of 1906, and makes it wholly the subject of the amendment. Not only was it manifest that the later act was intended to be a repeal of all parts and provisions of the statute amended which were omitted from it, but it expressly so declared.

As said in the opinion by Riely, J., in *Somers’ Case*, 97 Va., 759, 33 S. E. 381, a case in point here: “Where the later statute was plainly intended to embrace the whole legislation on the subject to which it refers, and to be wholly substituted for all former statutes on the same subject, it must be held to be a legislative declaration that whatever is embraced in it shall prevail and whatever is excluded is discharged and repealed.” See also the authorities cited in that case, and *Curran v. Ownes*, *supra*.

We are of opinion that the decree appealed from in this case is erroneous, and it will be annulled, and this court will enter the decree that the Corporation Court of the city of Staunton should have entered, dismissing appellee’s petition.

*Reversed.*

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**Syllabus.**

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**Richmond.**

BRYAN v. NASH.

November 18, 1909.

Absent, Buchanan, J.

1. **WILLS—Probate—Copy of Will Probated in Another State—Authentication—Collateral Attack.**—A sentence pronounced by a court having jurisdiction, whether it be admitting a paper to probate or excluding it from probate, as long as it remains in force, binds conclusively not only the immediate parties to the proceeding in which the sentence is had, but all other persons and all other courts. It cannot be collaterally attacked. The same rule applies to the probate of an authenticated copy of a will admitted to probate in another state. The fact of the due authentication of the copy is determined by its admission to probate, and this determination is conclusive on all persons and all courts until it is reversed in some appropriate proceeding. It cannot be collaterally assailed.
2. **COURTS—General Jurisdiction—Special Powers—Collateral Attack on Judgment.**—When a court of general jurisdiction acts within the scope of its general powers, its judgment will be presumed to be in accordance with its jurisdiction, and cannot be assailed collaterally. So also, if it has special powers conferred upon it by statute, which are to be and in fact are exercised judicially, and not merely ministerially, its judgment cannot be collaterally impeached. It is where a court of special jurisdiction has conferred upon it special powers by special statutes, which are only exercised ministerially and not judicially, that no presumption of jurisdiction will attend its judgment, and the facts essential to the exercise of special jurisdiction must appear on the face of the record.
3. **APPEAL AND ERROR—Correct Verdict—Ruling on Instructions.**—The ruling of the trial court on instructions will not be reviewed by this court when, upon the facts proved, there could not properly have been any other verdict than the one rendered by the jury.



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Error to a judgment of the Circuit Court of Rockbridge county in an action of ejectment. Judgment for the plaintiff. Defendant assigns error.

*Affirmed.*

The opinion states the case.

*Glasgow & White*, for the plaintiff in error.

*G. D. Letcher* and *E. M. Pendleton*, for the defendant in error.

CARDWELL, J., delivered the opinion of the court.

Archie Ranson owned, together with a sister, Alice Ranson, about twelve acres of land in Rockbridge county, with a small house thereon. Alice Ranson died in the fall of 1901 intestate, unmarried and without issue, leaving her brother her only heir at law. Archie Ranson lived the last years of his life in Washington, D. C., and died there April 18, 1902, leaving a will, which was probated in the probate division of the Supreme Court of the District of Columbia within a few months thereafter.

By said will the testator, Archie Ranson, devised his land in Rockbridge county to Addie Nash, to whom he was engaged to be married. A copy of the will was probated in the Circuit Court of Rockbridge county, and the order of probate is as follows:

“State of Virginia,

“At Rockbridge Circuit Court, December 21, 1906.

“The last will and testament of Archie Lewis Ranson, deceased, having been heretofore proved and admitted to probate and recorded in the Supreme Court of the District of Columbia, as appears from an authenticated copy thereof, together with a copy of the proof of the will and copies of orders of probate thereof thereto attached, was this day produced in court. And it appearing that the said will was duly executed as a will of

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personalty in the District of Columbia, the testator's domicile, and was so executed as to be a valid will of lands in the State of Virginia by the laws thereof, on motion of Addie Nash, one of the beneficiaries under said will, it is ordered that the said copy of Archie Lewis Ranson, deceased's, will, proved and admitted to probate and certified as aforesaid, be admitted to probate in this court as the last will and testament of the said Archie Lewis Ranson, deceased, both as a will of real and personal estate, and be recorded in the clerk's office of this court. And it is further ordered to be entered of record that the value of the estate passing by the said will in the State of Virginia was estimated at \$500.00, and that \$1.00 State tax was paid on the probate thereof.

“Teste:           A. T. Shields, Clerk.”

This probate proceeding was had pursuant to section 2536, Code, 1904, which is in this language:

“Sec. 2536. *Probate of copy of will proved without the State; to what extent admitted to probate.*—Where a will relative to estate within this State has been proved without the same, an authenticated copy thereof, and the certificate of probate thereof, may be offered for probate in this State. When such copy is so offered, the court to which it is offered shall presume, in the absence of evidence to the contrary, that the will was duly executed and admitted to probate as a will of personalty in the State or county of the testator's domicile, and shall admit such copy to probate as a will of personalty in this State. And if it appear from such copy that the will was proved in the foreign court of probate to have been so executed as to be a valid will of lands in this State by the law thereof, such copy may be admitted to probate as a will of real estate.”

It appears that soon after the death of Archie Ranson, W. L. Bryan, whose lands adjoined, desired to purchase the 12 acres of which Ranson died seised, and to that end he, on May 14, 1902, addressed a letter to the “Heirs of Archie Ranson” at Washington, D. C., which letter fell into the hands of a colored

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lawyer, Fountain Peyton, counsel for Addie Nash, and who answered Bryan's letter on July 21, and Peyton's letter was replied to by Bryan August 14, 1902. The purpose of this correspondence on the part of Bryan, which was kept up till in April, 1903, was doubtless two-fold—first to ascertain if Archie Ranson had left a will; and, second, to purchase at private sale the 12 acres of land from the rightful owners thereof. A part of this correspondence was conducted by Bryan, claiming to be the next of kin of Archie Ranson residing in Rockbridge county, in which it was represented to Addie Nash that there were debts being asserted against the interest of Alice Ranson in the land, and that unless they were satisfied the land would be sold, etc. At all events, the efforts of Bryan to purchase the land privately having failed, and the will of Archie Ranson not having been up to that time produced and probated in Rockbridge county, a chancery suit was instituted in the Circuit Court of Rockbridge county in August, 1903, by one John A. Ranson, the purpose of which was to have sold the 12 acres of land in question for partition among the plaintiff in that suit and certain defendants, named as the heirs at law of Alice Ranson, deceased, claiming that she had survived Archie Ranson, etc.; and in that suit the said land was sold by a commissioner of the court to W. L. Bryan at public auction, the sale confirmed, the purchase money, \$255.00, paid, and a deed of conveyance made and delivered to Bryan, bearing date June 5, 1905.

At the second August rules, 1907, this action of ejectment was brought in the Circuit Court of Rockbridge county by the said Addie Nash against the said W. L. Bryan, to recover the said tract of 12 acres of land claimed by her under and by virtue of the said will of Archie Ranson, deceased, and upon a trial of the cause upon the defendant's plea of the general issue and a special plea of setoffs for improvements to the land, the jury rendered its verdict in favor of the plaintiff for the land, allowing nothing for the defendant upon his plea of set-

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offs, and the court entered its judgment upon the verdict, to which judgment this writ of error was awarded the defendant.

The first assignment of error presents the question whether the copy of the will of Archie Ranson, deceased, was properly admitted to probate by the Circuit Court of Rockbridge county on December 21, 1906; the contention being that the copy of the will admitted to probate was never duly authenticated.

There is no merit in this assignment of error. The order of the Circuit Court admitting the will to probate recites every fact prescribed by the statute (section 2536, *supra*) necessary to the court's jurisdiction to enter it, and, being a court of general jurisdiction for the probate of wills, its judgment is final, and cannot be collaterally attacked.

In an elaborate argument, citing a great number of authorities, it is urged that there are irregularities in the certification of the execution of the will and of its probate in the probate court of the District of Columbia; but to follow up the argument and to review the authorities cited in support of it would be but going over the same ground that this court has gone over again and again to the conclusion repeatedly announced, that "a sentence pronounced by a court having jurisdiction, whether it be a sentence admitting a paper to probate or excluding it from probate, as long as it remains in force, binds conclusively not only the immediate parties to the proceeding in which the sentence is had, but all other persons, and all other courts." That was announced as the state of the law in *Connolly v. Connolly*, 32 Gratt. 657, and has since been adhered to. Many of the decided cases that had gone before the case of *Connolly v. Connolly* were cited, and we shall refer to a few of them.

In *Lancaster v. Wilson*, 27 Gratt., 629, referring to a judgment of probate of a will holding that such judgment is conclusive and final as to collateral attack, the court said: "It is not merely an arbitrary rule of law, established by the courts, but is a doctrine founded upon reason and the soundest principles of public policy. It is one which has been adopted in

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the interest of the peace of society, and the permanent security of titles.”

Plaintiff in error relies on section 3342 of the Code in support of the contention that the copy of the will of Archie Ranson admitted to probate in the Circuit Court of Rockbridge county was not duly authenticated; but with that statute, which merely prescribes how the records and proceedings of another State, or of the United States, are to be authenticated in order that they shall have faith and credit given them in the courts within this State, we are not concerned in this case. What would have been the force and effect of the statute had there been an appeal taken from the decision of the Circuit Court of Rockbridge county admitting the will of Archie Ranson to probate we are not called upon to determine in this litigation. As we have remarked, the order of the court admitting the will to probate recites every fact necessary to its jurisdiction under the statute (section 2536, *supra*), and whether its judgment was in the exercise of the court's powers as a court of general jurisdiction, or if special powers conferred upon it by the statute touching the probate of wills, as was unquestionably the case, the judgment is final and cannot be collaterally attacked. It is where a court of special jurisdiction has conferred upon it special powers by special statutes, which are only exercised ministerially and not judicially, that no presumption of jurisdiction will attend its judgments and the facts essential to the exercise of special jurisdiction must appear on the face of the record.

“When a court of general jurisdiction acts within the scope of the general powers, its judgments will be presumed to be in accordance with its jurisdiction, and cannot be collaterally impeached.

“When a court of general jurisdiction has conferred upon it special powers by special statute, and such special powers are exercised judicially, its judgment cannot be collaterally impeached.” *Pulaski County & Stuart v. Buchanan & Co.*, 28 Gratt., 872.

As said in *State of California v. McGlynn*, 20 Cal., 233,

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81 Am. Dec. 118: "The probating of a will is not a proceeding to decide a contest between parties, but a proceeding *in rem*, to determine the character and validity of an instrument affecting the title to property, and which it is necessary for the repose of society should be definitely settled by one judgment; and, therefore, the decree of probate is conclusive, not only upon the parties who may be before the court, but upon all other persons and upon all courts. The danger which might be apprehended from holding as conclusive, upon so important a matter as the probate of a will, the decree of a single court, and that not of the highest jurisdiction, is guarded against by the right of appeal to the Supreme Court, and by the statutory provision allowing the decision to be opened and the validity of the will to be again contested in the same court by any one interested, within one year from the admission to probate."

To the same effect is *Schultz v. Schultz*, 10 Gratt., 358, and in a note to a report of that case in 60 Am. Dec., at p. 353, the authorities are collated, and among those cited are *Ballou v. Hudson*, 13 Gratt., 682; *Norvell v. Lessueur*, 33 Grat., 222; *Connolly v. Connolly*, *supra*.

The case of *Norvell v. Lessueur*, *supra*, is directly in point here, and reiterates that it is a settled rule of law in Virginia that the admission of a will to probate generally is conclusive of its validity, both as a will of realty and personalty, which cannot be drawn in question, except on an issue *devisavit vel non* within the time and in the mode prescribed by the statute.

In that case the opinion by Staples, J., reviews many of the prior decisions of this court, citing them with approbation, including *Robertson v. Allen*, 11 Gratt., 787, where the will of a married woman was admitted to probate in the County Court of Fauquier, although at the date of the will a married woman could not make and publish a valid testamentary paper; but this court held that as the will appeared to have been regularly admitted to probate in the proper court, its validity could not be questioned collaterally.

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In 1 Woerner on Am. L. of Administration, sec. 145, following a discussion of the powers of judicial tribunals, the conclusiveness of their judgments in collateral proceedings is considered; and after speaking of the development and growth of the jurisdiction of courts of probate in the United States, and stating that it has given occasion to considerable divergence of authority on the question, whether their judgments are conclusive or impeachable collaterally, it is said: "The uncertainty produced by the vacillation of courts in this respect is not only perplexing to the administrators, practitioners, and judges, but injurious and sometimes ruinous to the interests of all persons concerned in the administration of estates; and particularly to the purchasers of real estate sold under the order of probate courts, who sometimes lose the fruits of their purchase because the officers of the court are not sufficiently skilled or careful to let the record show all jurisdictional facts; and to the heirs or creditors, because the risk incurred by purchasers depresses the price of the property at the sale." But, continues the learned author, "on principle there seems to be no difficulty attending the question, except, perhaps, to ascertain whether the tribunal intrusted with jurisdiction in probate matters is *a court*, with *judicial functions* in the common law sense, or whether its functions are *ministerial only*, or having no authority beyond special powers for the performance of specific duties not relating to the general administration of justice. If the latter be the case, it is obvious that, to give validity to its acts, it must affirmatively appear that everything necessary to such end has been observed. But if it be found that the tribunal is one competent *to decide* whether the facts in any given matter confer jurisdiction, it follows with inexorable necessity that if it decides that it has jurisdiction, then its judgments within the scope of the subject matter over which its authority extends, in proceedings following the lawful allegation of circumstances requiring the exercise of its power, are conclusive against all the world, unless reversed on appeal, or avoided for error or fraud in a direct



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proceeding. It matters not how erroneous the judgment; being *a judgment*, it is *the law* of that case, pronounced by a tribunal created for that purpose. To allow such judgment to be questioned or ignored collaterally would be to ignore practically, and logically to destroy, the court. And it is not necessary that the facts and circumstances upon which the jurisdiction depends shall appear upon the face of their proceedings, because, being competent to decide, and having decided, that such facts exist by assuming the jurisdiction, this matter is *adjudicated*, and cannot be collaterally questioned." Among the authorities cited in support of the text just quoted is *Cox v. Thomas*, 9 Gratt., 323.

It is argued, however, by the learned counsel for the plaintiff in error in this case, that the law as laid down in the authorities to which we have referred, does not apply to the probate of an authenticated copy of a will. This view, however, cannot be sustained by any authority to be found in the decisions of this or other courts. We have not been able to find a decision of this court covering directly the point made, but it has been dealt with in a number of cases decided in other States and adversely to the view contended for by the learned counsel for plaintiff in error; and the case of *Calloway v. Cooley*, 50 Kan. 743, 32 Pac. 372, is directly in point. It was there held that "Where a will executed, proved and admitted to probate in another State is presented for record to the probate court of a county in this State, in which land belonging to the estate is situate, and such court, upon the evidence submitted, finds and adjudges that the authentication of the copy presented for record is sufficient, its adjudication thereon cannot be collaterally attacked." Again, the opinion, at page 754 of 50 Kan., at page 376 of 32 Pac., says: "The probate court is vested with full power to inquire into the sufficiency of the authentication, and to ascertain whether under the proof offered the will should be admitted to record. Being vested with jurisdiction, its findings and determination are final, unless corrected upon appeal or proceedings in error, and are not subject to



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collateral attack. The statutes provide that the existence of certain facts are necessary before a will executed and proved in another State can be admitted to record in this State. One of the requisite facts is that the copy of such will, presented for record, shall be duly authenticated. This fact is to be determined upon proof, and the authority to determine it is conferred upon the probate court. . . . Under the statutes these requisite facts must be determined by the probate court; and it having exercised the jurisdiction, its determination, although it may have been erroneous, is conclusive upon all interested parties, and all courts, until it is reversed or reviewed in some appropriate proceeding."

In that case it appears, as in this case, that only a certificate of the facts proved and the fact of probate were certified, and the statute of Kansas was to the same effect as section 2536 of our own Code, *supra*, expressly requiring an authenticated copy of the will and the certificate of the probate thereof. In other words, the statute provides, that when a copy of a will relative to estate within this State is presented for probate in this State, the copy presented shall be authenticated by a certificate of the probate thereof in the court of another State. And this is exactly what was done in this case, as shown by the order of the Circuit Court of Rockbridge county admitting the will here in question to probate. See also *Whalen v. Nesbit*, 95 Ky., 464, 26 S. W., 188, dealing with a statute of Kentucky similar to the Virginia statute, section 2536, *supra*.

Having taken the view that the Circuit Court did not err in admitting in evidence in this case the will of Archie Ranson probated in the Circuit Court of Rockbridge county, it becomes unnecessary to consider the assignments of error relating to the instructions given by the court, for the reason that upon the facts proven before the jury there could not have been any other verdict than the one rendered by the jury in favor of the plaintiff, Addie Nash, for the land in question.

Nor do we deem it necessary to consider the argument made by the learned counsel, that the plaintiff, Addie Nash, is estop-

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ped to set up title to the land in question, since the facts abundantly show that the same doctrine might with equal propriety be invoked by her against the defendant Bryan. The plaintiff, under section 2547-a of Va. Code, 1904, had seven years from the date of the death of the testator, Archie Ranson, within which to probate the will before the Circuit Court of Rockbridge county, having jurisdiction for that purpose, and therefore she was wholly within her rights when she did offer the will for probate in December, 1906; and there is nothing in the testimony in this case even tending to show that she purposely or otherwise deceived or misled the defendant, Bryan, while, on the other hand, there is proof that Bryan knew that the plaintiff, Addie Nash, was claiming the land in question under and by virtue of a will executed by Archie Ranson and probated in the District of Columbia in 1902, and wrongfully undertook to acquire title to the land from sources other than the rightful owner.

Upon the whole case we are of opinion that the judgment of the Circuit Court of Rockbridge should be affirmed.

*Affirmed.*

Syllabus.

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**Richmond.**

TERRELL v. CHESAPEAKE AND OHIO RAILWAY Co.

November 18, 1909.

Absent, Buchanan, J.

1. RAILROADS—*Nuisance—Absence of Negligence.*—A declaration which sets out a nuisance committed by a railroad company in its private capacity states a good cause of action, though no negligence be charged.
2. RAILROADS—*Nuisance—Firing Up Engines—Site—Negligence.*—While it is necessary for a railroad company to fire up and clean its engines for the purpose of performing its public functions, yet, in selecting its site for doing such work, it is acting in its private capacity, and not in the performance of its public functions, and is liable, as a rule, for a nuisance resulting therefrom, even though the nuisance is not negligently caused.
3. RAILROADS—*Nuisance—Terminal Yards—Injury to Neighbors.*—Although it may be difficult for a railroad company to find a suitable site for a permanent terminal yard on which it may do the necessary preparation of its engines for use, if it is held liable for damages to individuals who may complain of a private nuisance created thereby, still the law gives a remedy to every citizen for the wrongs he may sustain, even though inflicted by forces which constitute factors in the material development and growth of the country, and this remedy it is the duty of the courts to enforce.
4. NUISANCE—*Damages—Damnum Absque Injuria.*—A loss resulting from a lawful act done without negligence is *damnum absque injuria*, but a nuisance is unlawful and, however carefully maintained, the party maintaining it is liable for the resulting injury to others.
5. NUISANCE—*Legislative Authority.*—The fact that a person or corporation has authority from the legislature or a municipality to do certain acts does not give the right to do such acts in a way constituting an unnecessary nuisance.

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Error to a judgment of the Corporation Court of the city of Charlottesville in an action of trespass on the case. Judgment for the defendant. Plaintiff assigns error.

*Reversed.*

The opinion states the case.

*Dabney & Fowler* and *Micajah Woods*, for the plaintiff in error.

*D. H. & Walter Leake*, for the defendant in error.

CARDWELL, J., delivered the opinion of the court.

The plaintiff in error brought an action of trespass on the case against the Chesapeake and Ohio Railway Company, and the declaration states that he was seised and possessed of a certain lot of land with a dwelling house thereon, known as No. 923 East Market street, in the city of Charlottesville, on the north side of said street, which lot fronts about 60 feet on said street and runs back in a northerly direction between parallel lines about 200 feet; that the Chesapeake and Ohio Railway Company, a corporation organized under the laws of the State of Virginia, was possessed of a certain lot of land lying on the south side of East Market street in said city, and directly opposite the plaintiff's premises; that on a part of its said lot, some time prior to the year 1903, the defendant had erected a building known as a roundhouse, but a large part of the defendant's lot in front of plaintiff's premises was, prior to the year 1905, used for the purpose of receiving, storing and delivering car and locomotive supplies and materials; that it became and was the duty of the defendant so reasonably to use its said lot as not to injure or interfere with the possession, use and enjoyment by the plaintiff of his said property; "yet the said defendant, not regarding its said duty in this behalf, but contriving and wrongfully and unjustly intending to injure and aggrieve the said plaintiff in the use and possession of his said

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property, heretofore, to-wit: on the ——— day of ———, 1905, laid on the said part of its said lot not occupied by the said roundhouse, and very near, to-wit: 75 feet from and in front of the said plaintiff's property, a number of short railroad tracks, to-wit, seven, in a segment or semi-circle, which said tracks have been used by the said defendant for the purpose of standing, storing and keeping such of its locomotives as were not in immediate use on divers days and times from the above date to the commencement of this suit"; that "here numbers of locomotives were kept by said defendant and cleaned, fired, steamed and repaired, without any roundhouse or other structure inclosing or covering the same, and without smokestacks of sufficient height to carry the steam, smoke, dust, ashes, cinders and odors above the said plaintiff's property"; that "from the engines so placed, hostled, tended and handled there were daily, and many times during the day and night, the ringing of bells, the blowing of whistles, the prolonged and deafening roar of steam when boilers were blown off to be washed, and the noise of blowers at work raising steam, and vast clouds of smoke, soot, dust, cinders and ashes poured from the smokestacks of the said locomotives over, upon, into and through and about the said plaintiff's dwelling and premises; and when the doors and windows of the said dwelling were open for light and air, smoke, cinders, soot, ashes and dust were discharged from said locomotives and blown in and through said doors and windows, settling upon the occupants of the house, and upon the furniture and furnishings, soiling clothes, bedding, curtains, food and other articles therein, and accompanied by foul and offensive odors, which tainted and corrupted the atmosphere and rendered the dwelling and premises unhealthy and unfit for habitation; and also covered the shade trees in front of said dwelling with soot and dust, and blackened and destroyed them and the flowers and other vegetation on and about said premises; and by means of the said smoke, dust and soot discharged as aforesaid on and about

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the said plaintiff's premises, the fences thereon and the front of his said dwelling have been blackened and rendered most dirty, disreputable and unsightly in appearance. And by reason of the aforesaid unreasonable, wrongful and unjust use by the said defendant of its said premises the said plaintiff has been and is greatly damaged in the use and possession of his said property, and the marketable and rental value of the same has greatly depreciated by means of the committing of the grievances as aforesaid by the said defendant. To the damage of the said plaintiff \$1,500.00."

The defendant demurred to the declaration, in which demurrer the plaintiff joined, the grounds of demurrer being that no negligence on defendant's part is alleged, and that independent of negligence the defendant is not liable.

Upon the hearing of the cause upon the demurrer the Corporation Court of Charlottesville sustained the demurrer, and to that judgment this writ of error was awarded.

That the defendant is a public service corporation is not questioned, and it is also conceded that the declaration sets out a nuisance, but the claim is that it is not an actionable nuisance. Therefore the sole question for determination is whether the nuisance was committed by the defendant in its *private* capacity, or as incidental to its *public* function of running trains for the carrying of passengers and freight.

The declaration, it may be said, is in all of its essential features identical with that considered by this court in *Townsend v. Norfolk Ry. & L. Co.*, 105 Va. 22, 52 S. E. 970, 115 Am. St. Rep. 842, 4 L. R. A. (N. S.) 87, and the plaintiff urges that that case controls the decision in this; while the defendant, with equal earnestness, claims that it is controlled by the earlier case of *Fisher v. Seaboard A. L. Ry. Co.*, 102 Va. 363, 46 S. E. 381.

In the earlier of these cases Fisher sued to recover damages for a nuisance caused by "running trains and locomotives over and upon" defendant's track and trestle; while in this case the

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declaration alleges that defendant used its lot, in front of and adjacent to its roundhouse, for the purpose of "standing, storing and keeping such of its engines as were not in use," and "cleaning, firing, steaming and repairing" same, and that "from the engines so placed, hostled, tended and handled," the nuisance complained of resulted.

In the *Townsend* case, as in this, negligence was not charged, but in both facts constituting the nuisance are duly alleged, and in the *Townsend* case the operation of a powerhouse for generating electricity to run an electric railway was the *modus injuriæ*, and this court, though conceding that the electric railway was a public service corporation with the power of eminent domain, held that it had no legislative authority to operate its powerhouse to the injury of the plaintiff, Townsend, on the ground that such operation was not incidental to its public function of running cars, the opinion saying: "It is true that an electric railway cannot be operated without a powerhouse. It is true that an enginehouse is a necessary adjunct to a steam railway; but they are incidents to the operation of the road, with which the public has no concern."

It cannot be maintained that the storing, blowing out, cleaning and firing of engines on an open yard is more incidental to the public function of carrying passengers than a roundhouse for the sheltering of engines, or a power-house for the generation of electrical power. The one is not, when considered on a demurrer to a declaration or to a plea setting up such a defense, any more incidental to the performance of the public function of the carrier than the other. The true distinction between a public and a private function, when exercised by a public service corporation, is so lucidly and exhaustively drawn in the *Townsend* case that little need be added to what is there said. As a preface to the discussion of the question in that case the opinion says: "A public service corporation is to be considered in two aspects. It has duties which it owes to the public, and which it must perform. It has other duties not of

a public nature, which are incidental to those of a public character, in the performance of which it stands upon the footing of a private corporation. With respect to the duties of the first class, it may be said that, in doing that which under the law it may be required to do, it cannot be considered as doing an unlawful act; and if a lawful act be done without negligence, any injury which it occasions is *damnum absque injuria*."

Authorities are cited with approval as follows: "A railway company is authorized to acquire land within specified limits, and on any part of that land to erect workshops. This does not justify the company, as against a particular householder, in building workshops so situated (though within the authorized limits) that the smoke from them is a nuisance to him in the occupation of the house." Pollock on Torts (2d ed.), p. 158.

"The common carrier serves both the public and itself. It has its public and private functions. The public part is the exercise of its franchise for the accommodation of the public. The private part is its incidental business, with which the public is not concerned, and which the company manages for its own interest. The company carries passengers over its road as a public duty, but the generation of power to propel cars is the private business of the company. Whatever is necessary to the exercise of the franchise is for the benefit of the public, but that which pertains simply to means of supply is a private business of the company." *In re Rhode Island R. Co.*, 22 R. I. 457, 48 Atl. 592, 52 L. R. A. 879.

"But over and beyond this, we think a corporation in selecting a place for its roundhouse acts in a private capacity and is responsible for the injurious consequences which may result from its use." *L. & N. Term. Co. v. Jacobs*, 109 Tenn. 727, 72 S. W. 957, 61 L. R. A. 192, citing *Railroad v. Fifth Bap. Church*, 108 U. S. 317, 27 L. Ed. 739, 2 Sup. Ct. 719; *Cogswell v. Railroad*, 103 N. Y. 10, 8 N. E. 537, 57 Am. Rep. 701.



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With respect to the *Fifth Baptist Church* case the learned counsel for the railway company in this case make the point that while the opinion in that case used the expression, "A railroad, in selecting a place for repair shops and enginehouse, acts altogether in its private capacity, there is nothing in the case with regard to the public and private capacity of a railroad, the decision being rested emphatically upon the proposition that in selecting the place for its roundhouse the railroad had made an unreasonable choice, a claim that is not made in the case at bar." This view of that case, however, was not taken by this court in the *Townsend* case, nor in the large number of cases in which it has been cited with approval. It is not necessary to the liability of a public service corporation for a nuisance caused by an unlawful use of a powerhouse, or of a site selected and used as a roundhouse, that the corporation had made an unreasonable selection, but the question in this as in the *Townsend* case is, was the corporation acting in its *private* capacity, as distinguished from its *public* function, when operating the nuisance complained of? In the *Townsend* case the corporation was held to be acting in its *private* capacity as distinguished from its public function when so operating its powerhouse as to cause a nuisance damaging to adjacent property owners, and the effort to distinguish that case from this is in vain.

It is very true that it is necessary for a public service corporation, having the franchise to construct and operate a railway line for the carrying of passengers and freight, to fire up and clean its engines for the purpose of performing its public functions; and it is equally true that it is necessary for a street railway to have and operate a powerhouse for the generation of its transportation power; but the one in selecting and operating its powerhouse, as well as the other in selecting a site for its roundhouse and making use thereof is, as the great weight of the authorities conclusively show, to be held as acting in its *private* capacity, and not in the performance of its *public* func-

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tion, and is liable, as a rule, for a nuisance resulting therefrom, even though the nuisance is not negligently caused. See report of the *Townsend case*, with authorities 4 L. R. A. (N. S.) 87.

In answer to the argument of the learned counsel for the railway company in this case, that the view just stated is in conflict with the decision in the *Fisher case*, and that this case is controlled by that case and not the *Townsend case*, we deem it only necessary to refer to the exhaustive opinion of Keith, P., in the last-named case, upon a petition for a rehearing, where the authorities are reviewed at greater length than in the original opinion, the result being a denial of the prayer for a rehearing.

It is finally argued on behalf of the railway company in this case: "If the appellee is to be made to pay damages in this case, and this principle is established as the law in Virginia, then it is difficult to perceive how, where and when a railroad company in this State may establish a permanent terminal yard on which it may do its business necessary to the 'hostling' of its engines. If said principle is once established, the running of trains upon the roads in this State will become difficult—at best, a most expensive matter—and possibly may be prevented entirely."

Similar suggestions as to the consequences of adhering to the rule of law established by the authorities applicable to cases of this character were made in the *Townsend case*, to which the opinion replied as follows: "It would be a source of regret if, in the administration of justice by the establishment and enforcement of sound principles, the prosperity of our people should be hindered or checked, but it would be not only a source of regret, but of reproach, if material prosperity were stimulated and encouraged by a refusal to give to every citizen a remedy for wrongs he may sustain, even though inflicted by forces which constitute factors in our material development and growth. Courts have no policies, and cannot permit consequences to in-

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fluence their judgments further than to serve as warnings and incentives to thorough investigation and careful consideration of the causes submitted to them. Those duties being faithfully performed, courts may await the result with patience, if not always with confidence, and say with the great Lord Mansfield, '*Fiat justitia, ruat coelum.*' "

We have not deemed it necessary to consider the argument of the learned counsel for the plaintiff, that even if the nuisance complained of were done in the exercise of a public function, the demurrer to the declaration should be overruled, under sec. 58, art. IV of the present Constitution, since the injury from the engines, as alleged in the declaration, was done after the adoption of the Constitution in 1902, when there was added to the provision of the former Constitution, with respect to the taking of private property for public use, the provision that *damage* to property, even for a public use, shall be compensated for. The purport and effect of this change in the Constitution, which we do not think is necessary to be considered again here, was fully considered and determined in *Tidewater Ry. Co. v. Shartzer*, 107 Va. 562, 59 S. E. 407, 17 L. R. A. (N. S.) 1053, and we shall be content with a mere reference to the opinion in that case.

The decision of the *Townsend case*, which is conclusive of this upon the demurrer to the declaration, was based upon the principle that a nuisance is unlawful; and though when an injury results from a lawful act, done without negligence, the injury is *damnum absque injuria*, yet however carefully one may maintain a nuisance he is liable for the resulting injury to others. See also Wood on Nuisances, pp. 709, 1277, where the rule is clearly stated and discussed.

The principles of law applicable to such a case are also clearly and forcibly stated in 29 Cyc., pp. 1198-1199, as follows:

"A statutory sanction cannot be pleaded in justification of acts which by the general rules of law constitute a nuisance, unless the acts complained of are authorized by the express

terms of the statute under which the justification is made, or by the plainest and most necessary implication from the powers expressly conferred, so that it can be fairly stated that the legislature contemplated the doing of the very act which occasions the injury. So in an action for a nuisance consisting of smoke entering plaintiff's house from defendant's chimneys, it is no defense that the chimneys are as high as the city regulations for chimneys require, if in fact they are not high enough to keep the smoke out.

"It is a condition always implied by law that rights granted or regulated by statute shall be exercised by their possessors with due regard to the rights of other persons, and so the fact that a person or corporation has authority from the legislature or a municipality to do certain acts does not give the right to do such acts in a way constituting an unnecessary nuisance. Thus the fact that a railroad is constructed and operated under statutory authority does not deprive neighboring property-owners of their remedy for annoyances and injuries not necessarily incident to the operation of the road in the vicinity. Neither can defendant's possession of the right of eminent domain legalize a nuisance, but until defendant has exercised such power and by the authority thereof acquired plaintiff's property, defendant's illegal acts resulting in the substantial impairment or destruction of the property constitute an actionable nuisance."

See also, *Rosenheimer v. Standard Gas Light Co.*, 36 N. Y. App. Div. 1, 55 N. Y. Supp. 192; *Gunster v. Met. Elec. Co.*, 214 Pa. 628, 64 Atl. 91.

We are of opinion that the judgment of the corporation court sustaining the demurrer to the declaration in this case is erroneous. Therefore, it will be reversed, the demurrer overruled, and the case remanded to be further proceedd with in accordance with the views herein expressed.

*Reversed.*

Syllabus.

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**Richmond.**

CHESAPEAKE AND OHIO RAILWAY CO. v. GREAYER.

November 18, 1909.

Absent, Buchanan, J.

1. NUISANCE—*Evidence—Opinion—Statement of Facts.*—Upon a complaint that a roundhouse of a railroad company and the short tracks adjacent thereto, are a private nuisance, a witness who is thoroughly familiar with the company's property, the necessity for roundhouse facilities and the convenience of the location for the same, may testify as to the necessity for the use made by the company of its roundhouse and the short tracks adjacent thereto. This is a statement of facts.
2. WITNESSES—*Objection to Question—Subsequent Admission of Same Question—Waiver.*—An objection to a question propounded to a witness will be deemed to have been waived, where subsequently, in the examination of the witness, practically the same question was permitted to be asked and answered without objection.
3. TRESPASS ON REAL PROPERTY—*Wilfulness—Negligence—Failure to Prove Wilfulness—Surplusage in Declaration.*—Neither wilfulness nor negligence is necessary to make a trespass on real estate a tort, and when the owner brings his action therefor alleging that it was done wilfully and unnecessarily, and the proof fails to sustain this allegation, the owner is still entitled to recover actual damages on proof of the unintentional trespass. The words "wilfully and unnecessarily" may be stricken from the declaration as mere surplusage, without impairing the plaintiff's pleading in the matter of setting out a good cause of action.
4. NUISANCE—*Injury to Property—Negligence.*—If, in an action to recover damages for a private nuisance, the plaintiff proves the existence of the nuisance causing injury to his property, it is immaterial whether the nuisance was created or operated negligently or not.
5. APPEAL AND ERROR—*Instructions—Jury Fully Instructed—Rulings on Other Instructions.*—If the jury were fully and fairly instructed on the whole case so that they could not have been misled by the instructions, it is unnecessary for this court to consider

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the propriety of the rulings of the trial court on other instructions tendered and refused.

6. VERDICTS—*Evidence to Support.*—The verdict of a jury should not be set aside when the evidence before the jury was ample to sustain their finding.

Error to a judgment of the Corporation Court of the city of Charlottesville in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

*Affirmed.*

The following instructions were given on the motion of the plaintiff:

(1) "The court instructs the jury that if they believe from the evidence that the defendant railway company has injured the property of the plaintiff, Mrs. Greaver, as alleged in the declaration, either from negligently permitting its roundhouse to get out of repair, as alleged in the first count in the declaration, or from wilfully and unnecessarily standing, firing, cleaning and tending locomotives on its said lot mentioned in the second count of the declaration, without any structure enclosing the same, they must find for the plaintiff. And in assessing her damages, if the jury believe the injury only temporary they can take into consideration only the damage to the use and enjoyment, and the rental value of said property, accruing within the last five years prior to the commencement of this suit. And if the jury believe the injury of a permanent character, accruing within the last five years prior to the commencement of this suit, they may also take into consideration the depreciation of the market value caused thereby."

(2) "The court instructs the jury that a railroad company in the location of repair shops, and roundhouses, and the construction and maintenance thereof, acts in its private capacity, and is bound to so locate, construct, maintain and use such structures, and its property adjacent thereto, as not to inflict any injury on the property, or invade the rights of others.

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“And if they believe from the evidence in the case that the defendant has so placed its works, or has so maintained and operated its roundhouse, and the tracks adjacent thereto, as by their use to unreasonably interfere with and disturb the peaceful and comfortable enjoyment by the plaintiff of her property, then the said defendant must pay such damages to the said plaintiff as would in their judgment, in view of all the evidence, be a just compensation for the injury thereby sustained.”

The following instructions were tendered by the defendant, but were refused:

No. 4. “The court instructs the jury that the plaintiff cannot recover upon the second count of the declaration unless they believe from the evidence that the use and operation of the short railway tracks complained of in the declaration, was wilful and unnecessary; that is, with an intent, express or implied, to injure the property of the plaintiff and unnecessary for the purposes of the defendant company.”

No. 5. “The court instructs the jury that if they believe from the evidence the construction, use and operation of the spur tracks complained of in the declaration were for purposes necessary and incidental to the operation of the engines and trains of the defendant company, they must find for the defendant upon the second count in the declaration.

No. 6. “The court instructs the jury that there can be no recovery in this case upon the second count in the declaration.”

No. 7. “The court instructs the jury that the second count in the declaration is based upon the alleged wilful and unnecessary use of the short railway or ‘spur tracks’ for the purposes therein mentioned, and in order for there to be a recovery thereon, the jury must believe from the evidence that the same is both wilful and unnecessary. The court further instructs the jury that unless they believe the acts complained of were wilfully done, with an intent, either express or implied, to injure the property of the plaintiff, by agents and servants of the defendant company, acting within the scope of their em-

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ployment, with the knowledge and acquiescence of the defendant company, through some or one of its officers, they must find for the defendant."

*D. H. & Walter Leake*, for the plaintiff in error.

*Dabney & Fowler* and *Micajah Woods*, for the defendant in error.

CARDWELL, J., delivered the opinion of the court.

Defendant in error brought this action to recover damages of the Chesapeake and Ohio Railway Company for injuries resulting from the maintenance of a nuisance on the defendant's property, and at the trial there was a verdict in favor of the plaintiff for \$300, upon which the judgment to which this writ of error was awarded was rendered.

The law of this case is fully discussed and settled by this court in its opinion just handed down in the case of *N. A. Terrell v. Chesapeake & Ohio Ry. Co.*, ante, p. 340, 66 S. E. 55, and we shall be content with a reference to that case and the authorities there cited for the law applicable to this case.

The nuisance complained of in each of these cases is practically the same, and the declaration in this case is identical in its allegations with that in the former case, except that in the second count of the declaration in this case there is the additional charge that the acts of the defendant constituting the nuisance complained of were wilfully and unnecessarily done.

Of the eight errors assigned, the first and second, relating to the rejection of pleas Nos. 3 and 6, are waived, and the third relates to the ruling of the court in allowing the witness, W. H. Greaver, to answer a question in regard to whether or not the short railway tracks, the use of which is complained of in the second count in the declaration, could be moved to another place on the defendant's roundhouse property.

There was no error in this ruling to the prejudice of the defendant. Greaver was shown to have had charge of the yard as



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yardmaster for a number of years, and that he was thoroughly familiar with the company's property, the necessity for roundhouse facilities and the convenience of the location for the same, and it was entirely competent for him to testify as to the necessity for the use made by the defendant of its roundhouse and the short tracks adjacent thereto, upon which the declaration alleged the company stood its engines for the purpose of blowing them out, cleaning them, etc. In answer to the question propounded and objected to he gave no opinion, but stated facts only.

What has been said with reference to the objection to the question propounded to the witness Greaver, applies as well to the fourth assignment of error relating to the ruling of the court in permitting N. A. Terrell to answer a similar question; and there the witness expressed no opinion, but simply stated the facts as to the conditions existing at the defendant's roundhouse and yard.

With respect to the fifth assignment of error, which relates to the ruling of the court in excluding the testimony of R. A. Ham, as to whether the manner in which the engine pits were used within the last five years was incidental and necessary to the operation of the defendant's trains, all that need be said is that later in the examination of this witness practically the same question was propounded to him and he was permitted to answer it without objection.

The sixth assignment of error is to the giving of the instructions asked for by the plaintiff, the defendant excepting to each and all of them.

There was practically no conflict in the evidence as to the facts touching the use by the defendant of its roundhouse and yard, as complained of in the declaration, and causing the nuisance which resulted in the injury to plaintiff's property; and the instructions given by the court propounded the law clearly and correctly as it has been enunciated in the case of *Terrell v. C. & O. Ry. Co.*, *supra*.

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Error is also assigned to the refusal of the court to give certain instructions propounding the law of the case directly in conflict with the instructions rightly given for the plaintiff; and these instructions were properly refused.

Stress is laid, however, upon the refusal to give the fourth instruction asked for by the defendant, which sought to have the jury told that the plaintiff could not recover upon her second count in the declaration unless they believed from the evidence that the use and occupation of the short railway tracks was wilful and unnecessary—that is, with an intent, express or implied, to injure the property of the plaintiff, and unnecessary for the purpose of the defendant company. In other words, the purpose of the instruction was to tell the jury that in the absence of proof that the acts on the part of the defendant were wilful and unnecessary, the plaintiff could not recover.

The acts constituting the nuisance which resulted in injury to the plaintiff's property were clearly and succinctly set out in the declaration, and fully proved by the testimony; and even if it were conceded that the words "wilful and unnecessary" constituted the charge of negligence, this would not relieve the defendant from liability in the action, for two reasons—one is that this language in the declaration might be regarded as surplusage, and the other, that it merely accentuated the wrongs of the defendant resulting in the injury to plaintiff's property.

"Neither wilfulness nor negligence is necessary to make a trespass on real estate a tort, and when the owner brings action therefor, alleging only that it was done wilfully and oppressively and the proof fails to sustain this allegation, the owner is still entitled to recover actual damages on proof of the unintentional trespass. *Baldwin v. Telegraph Co.*, 78 S. C. 419, 59 S. E., 67.

So that the words "wilfully and unnecessarily" could be stricken from the declaration as being mere surplusage, without impairing the plaintiff's pleading in the matter of setting out a good cause of action; and even if they could not be stricken out, it was clearly proved that the acts of the defendant com-

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plained of were unnecessary, because there was ample space to erect a building over the company's pits and tracks, so as to protect the property of the plaintiff from injury arising from the escape of smoke, cinders, dust, etc., from the uncovered engines of the defendant standing upon its yard.

In this case, as in the case of *Terrell* against the same defendant, *supra*, the contention is that the use or manner of use of the defendant's property constituted a private nuisance, while the defendant insists that such use is authorized by law and does not exceed what is required by the necessities of the business in which it is lawfully engaged, and that consequential injuries to the plaintiff were only such inconvenience as one must suffer or sustain to personal property rights by the use by another of his own property.

That this contention of the defendant is unsound is fully settled and disposed of by the opinion in *Terrell v. C. & O. Ry. Co.*, *supra*, and the authorities there cited. The plaintiff in this case having proven the existence of a nuisance causing injury to her property, whether the nuisance was created or operated negligently or not is immaterial.

The two instructions given for the plaintiff covered the whole case and precluded a recovery, unless the jury believed that the nuisance alleged in the declaration had been proved, and fully protected the defendant. Therefore, the jury could not have been misled by the instructions.

The remaining assignment of error is to the refusal of the court to set aside the verdict as contrary to the law and the evidence.

In this ruling there was no error, as the evidence is ample to prove that the injury to the plaintiff's property by reason of the nuisance caused and operated by the defendant within the past five years was of a very serious character, and certainly to the amount of the verdict of the jury, \$300; that as long as the roundhouse was in good condition no damage resulted therefrom; that a roundhouse could be built over the engines stored

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on the yard ; and that the nuisance and resulting injury to the plaintiff was from both the defective roundhouse and the uncovered engines standing upon the yard, and from time to time blown out, cleaned, etc.

Upon the whole case, we find no error in the record prejudicial to the defendant, and the judgment of the Corporation Court of the city of Charlottesville must be affirmed.

*Affirmed.*

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Statement.

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**Richmond.**

## CRAWFORD v. HEATWOLE &amp; HEDRICK.

November 18, 1909.

Absent, Buchanan, J.

1. DAMAGES—*Stipulation for Liquidated Damages—Validity.*—Parties to a contract may stipulate in advance for the payment of a sum certain as liquidated damages, in case of breach, where the damages are in their nature uncertain and unascertainable with exactness at the time the contract is made, and may be dependent upon extrinsic conditions and circumstances, and where the amount fixed is not on the face of the contract out of all proportion to the probable loss.
2. DAMAGES—*Stipulation for Liquidated Damages—Estimated Rental Value.*—A contract to pay ten dollars a day as liquidated damages for failure to complete, by a given time, a dwelling intended as a home for the owner, is not unconscionable or unreasonable, and will be upheld where the price of the house and lot amounted to seven thousand dollars, and there were special reasons why the owner desired to get into the dwelling at the time stipulated. The estimated rental value of the house and lot, under such circumstances, affords no just criterion for the measure of damages.

Error to a judgment of the Circuit Court of Rockingham county in a proceeding by motion for a judgment for money. Judgment for the plaintiffs. Defendant assigns error.

*Reversed.*

The opinion states the case.

*James B. Stephenson and D. O. Dechert*, for the plaintiff in error.

*Roller & Martz*, for the defendants in error.

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WHITTLE, J., delivered the opinion of the court.

This motion was brought by the defendants in error, Heatwole & Hedrick, against the plaintiff in error, Crawford, upon a building contract bearing date July 25, 1907.

The agreement contained a stipulation for the completion of the dwelling "not later than January 1, 1908, and in the event that the said residence is not fully completed by that date, then . . . the parties of the second part are to pay to said party of the first part \$10 per day for each day that said residence remains incomplete, the aforesaid sum being by way of damages, the same being agreed to by all parties to this contract." There was a further provision, that if the weather was such that the work could not be carried on to advantage so as to insure "a first-class job," the contractors were not to be charged with time so lost.

The building was not completed until March 7, 1908, and the defendant having paid into court the amount admitted to be due, withheld the sum of \$660 as liquidated damages.

The trial court instructed the jury that the sum agreed on as damages constituted a penalty and was not recoverable, which ruling presents the only question which demands our consideration.

The house was constructed as a habitation for the defendant and his family, at a total cost of \$7,000—\$1,600 for the lot and \$5,400 for the building; and the rental value was estimated at \$35 per month. It also appears that the defendant urged as a special reason why the building should be completed within contract time, that his wife, to whom he had been recently wedded, was in a delicate condition, that they were living in a boardinghouse, and particularly desired to occupy their own home.

The general rule is well settled that parties to a contract may stipulate in advance as to the amount which shall be paid in compensation for loss or injury which may result from a breach

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of the agreement, if such breach should occur, when the damages are uncertain and difficult of ascertainment.

In 1 Sutherland on Dam. (3d ed.), sec. 279, it is said: "As a general rule, when the injury resulting from the breach of a contract is susceptible of definite measurement, as where the breach consists in the non-payment of money, the parties will not be sustained in the enforcement of stipulations for a further sum, whether in the form of penalty or liquidated damages; but where the damages sustained are uncertain and are not readily susceptible of being reduced to a certainty by legal computation, they may be determined before a breach occurs."

This general statement of the rule is in accord with the trend of judicial thought and decision.

"The question whether a sum named in a contract to be paid for a failure to perform," says Earl, J., in *Kemp v. Knickerbocker Ice Co.*, 69 N. Y. 45, "shall be regarded as stipulated damages or a penalty, has been frequently before the courts, and has given them much trouble. The cases cannot all be harmonized, and they furnish conspicuous examples of judicial efforts to make for parties wiser and more prudent contracts than they have made for themselves. Courts of law have, in some cases, assumed the functions of courts of equity, and have relieved parties by forced and unnatural constructions from stipulations highly penal. Where an amount stipulated as liquidated damages would be grossly in excess of the actual damages, they have leaned to hold it a penalty. Where the actual damages were uncertain and difficult of ascertainment, they have leaned to hold the stipulated amount to have been intended as liquidated damages. No form of words has been regarded as controlling. But the fundamental rule, so often announced, is that the construction of these stipulations depends, in each case, upon the intent of the parties, as evidenced by the entire agreement construed in the light of the circumstances under which it was made."

The opinion of Mr. Justice White on this subject, in *Sun*

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*Printing & Publishing Association v. Moore*, 183 U. S., 642, 46 L. Ed. 366, 22 Sup. Ct. 240, will be found to be instructive. He summarizes the governing principle as follows: "Damages are deemed liquidated at the stipulated sum when the actual damages contemplated at the time the agreement is made are in their nature uncertain and unascertainable with exactness, and may be dependent upon extrinsic considerations and circumstances, and the amount fixed is not on the face of the contract out of all proportion to the probable loss. . . . If a construction of an agreement be doubtful, that construction must be adopted which makes the covenant most beneficial to the promisee."

Sutherland, at sec. 284, commends this decision, which he says "puts agreements for the liquidation of damages upon substantially the same footing as other contracts in which fraud, surprise or mistake has not entered."

On the same subject (sec. 291, at pp. 761-2) the learned author says: "Damages for failure to complete a house, or any other structure, may sometimes be ascertained proximately by a rental standard. But where intended for a particular purpose other than to be rented, and when delay may hinder or thwart other and dependent contracts or enterprises, the damages will be more uncertain. In a building contract containing the usual clauses fixing the days for completing the various parts of the work, a stipulation to the effect that any neglect to comply with the conditions of the contract and finish the work as provided should entitle the employer to claim damages at the rate of \$10 per day for every day's detention so caused was held a covenant for stipulated damages."

Numerous cases from courts of last resort of the States and Canada are cited in support of the text—though the author adds: "There are authorities to the effect that the damages ordinarily resulting from the failure to fulfil a building contract which contains only the usual conditions are not so uncertain as to be the subject of such stipulations, the extrinsic circumstances not being unusual; but the decisions are far from being unanimous



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on the question.” After citing authorities in support of the minority rule, or rather the qualification of the general rule, the author adds: “But see *Ward v. Hudson River R. Co.*, 125 N. Y. 230, 26 N. E. 256; *Sun Printing & Pub. Asso’n v. Moore*, 183 U. S. 642, 46 L. Ed. 366, 22 Sup. Ct. 240. With the exception of the decision in *Welsh v. McDonald*, 85 Va. 500, 8 S. E. 711 (where it was held that a stipulation in a building contract for the payment of \$5 per day as damages for delay in completing a house worth \$750 was stipulated damages and not a penalty), the Virginia cases dealing with conventional liquidation are not pertinent and need not be reviewed.”

The case in judgment comes well within the general rule laid down by Mr. Sutherland. The intention of the parties to fix in advance the compensation to be paid by way of damages for a breach of contract, should such breach occur, with respect to the time within which the house was to be completed, is unmistakable. The building was not intended for rental purposes, but for a home, and consequently the estimated rental value affords no just criterion for the measure of damages. Considered in connection with the cost of the property, the stipulated damages cannot be regarded as either unconscionable or unreasonable. Superadded to the difficulties in the way of estimating with approximate precision the damages usually inhering in this class of contracts, the condition of the defendant’s wife and the circumstances in which they were placed by the delay, render it all the more difficult to calculate the damages by marketable values.

From these considerations it follows that the judgment must be reversed and the case remanded for a new trial.

*Reversed.*

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Syllabus.

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**Richmond.**

## CODY v. NORTON COAL CO.

November 18, 1909.

Absent, Buchanan, J.

1. **SALES—Warranty of Fitness—Negligent Use—Personal Injury—Damages.**—Although the seller of a fuse may have warranted it to be fit for the purpose for which it was intended, and that no personal injury would be inflicted in consequence of any defect therein, still the right to recover for a personal injury inflicted on the purchaser in consequence of the use thereof is subject to the qualification that the purchaser must have used it in a reasonable, careful and proper manner, and that the damages sustained must have been such as might have been reasonably anticipated.

2. **PLEADING—Declaration—Allegation of Negligence—Contributory Negligence—Case at Bar.**—A declaration, after alleging that the plaintiff purchased of the defendant fifty feet of fuse which the defendant warranted to be suitable for the use for which it was intended, averred that the plaintiff undertook to use the fuse in making a blast, and that when the fuse was first lighted in the ordinary way, and according to approved methods, it failed to fuse and smoke in the ordinary way; that supposing that the fuse had not taken fire, he undertook to light it a second time; that it again failed to show any sign of being lighted, as it should have done, and appeared to go out; whereupon the plaintiff supposing that the fuse had not taken fire, frazzled the end in the ordinary and customary way, and again applied the blaze, and again the fuse failed to respond; whereupon he again frazzled the end and applied the blaze the fourth time, and immediately upon the application of the blaze the explosion took place causing the injury of which the plaintiff complains. There was a demurrer to the declaration.

**Held:** The conduct of the plaintiff in remaining by the fuse after he had applied fire to it precludes a recovery, and the demurrer to the declaration was, therefore, rightly sustained.

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Opinion.

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Error to a judgment of the Circuit Court of Wise county in an action of trespass on the case. Judgment for the defendant. Plaintiff assigns error.

*Affirmed.*

The opinion states the case.

*Pennington Bros. and Duncan & Kelly*, for the plaintiff in error.

*Bullitt & Chalkley and Ayers & Fulton*, for the defendant in error.

KEITH, P., delivered the opinion of the court.

Cody, plaintiff in error, sued the Norton Coal Company to recover damages for an injury. The defendant demurred to the declaration. The demurrer was sustained, and the suit dismissed.

The first count states that the plaintiff was an employee of the Norton Coal Company, which was engaged in mining coal; that the plaintiff was required to furnish his own tools and blasting material necessary in performing the services for which he had contracted with the defendant in and about the business of mining coal; that the defendant owned and operated a commissary store, where it sold to its employees blasting material, fuses and tools; that he purchased from the defendant fifty feet of fuse for blasting purposes, which the defendant warranted to be suitable for the use for which it was intended; that afterwards he took a portion of the fuse to the place assigned him to work in the mine, and after having prepared to make a blast with the fuse in connection with a stick of dynamite, the fuse so purchased from the defendant proved to be defective and not fit for the use for which he purchased it, "and when the said fuse was lighted in the ordinary way and according to approved methods of mining, and without any negligence or failure on the part of the said plaintiff to do and perform his duty in the manner of

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handling the said fuse, the said fuse as aforesaid, when lighted, failed to fuse and smoke in the ordinary way. The said plaintiff, as he had a right to do, supposing that as said fuse failed to show any signs of taking fire, undertook to light the said fuse the second time, whereupon the said fuse again failed to show any signs of being lighted, as it should have done, and appeared to go out, whereupon the said Cody, again supposing that said fuse had not taken fire, frazzled the end of the said fuse, as is customary and ordinary in cases of that kind, and again applied the blaze, and again the said fuse failed to respond or show any signs of having taken fire, whereupon the said plaintiff again frazzled the end of said fuse in the ordinary and customary way in mining, and applied the blaze again the fourth time, and immediately upon the application of the said blaze at the fourth time the said blast exploded thereby and with great force and violence . . . greatly injuring the said plaintiff by blowing out one of his eyes and severely injuring the other, breaking his left hand, tearing off his forefinger, and severely burning his face, neck and breast."

The second count is substantially identical with the first in the statement of facts as to the accident and the conduct of plaintiff at that time, and differs from it in that it does not aver a warranty of the fuse at the time of the purchase, but that when the fuse was purchased the defendant held it out and represented it to be suitable for the purposes for which it was intended; that the plaintiff relied upon the said representations, was himself ignorant that the fuse was defective and unsuitable for the purposes for which it was intended; and that the defendant did know, or by the use of due and ordinary care should have known, at the time of the sale that the fuse was dangerous and unsafe for the purposes for which it was purchased.

The defendant stated as the grounds of its demurrer (1) that "said declaration shows that the accident was caused by the contributory negligence of the plaintiff, viz., by his remaining by

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the fuse after he had lighted it; (2) that the damage complained of was not the natural and probable result of a defective fuse; and (3) that the damages complained of are too remote. Defendant says that the second count in the said declaration is not sufficient in law, and, therefore, it demurs thereto, and for grounds of demurrer it alleges the same as are above set forth with reference to the first count, and also because said count does not show that defendant was in any manner responsible for any defect which might have existed in the fuse in the declaration referred to."

For our present purpose we shall concede, first, that there was a warranty, express or implied, with respect to the fitness of the fuse for the purposes for which it was intended; and, secondly, that for the same purpose it may be conceded that the warranty covers personal injuries inflicted by reason of the defect in the article warranted. Having made these concessions, we are further of opinion that the right of recovery must be subject to the qualification that the person injured by a breach of the warranty must have used the article purchased in a reasonable, careful and proper manner, and that the damages sustained must have been such as might have been reasonably anticipated.

In blasting coal or stone a hole is drilled in the object to be blasted, the explosive is introduced, is connected with a fuse, the hole is filled with earth or some proper material, properly tamped, and the fuse is fired. The fire passing along the fuse communicates with the powder or dynamite, and the explosion takes place. Obviously a suitable fuse must take fire when a lighted match or fire is brought into contact with it, and must continue to burn until it reaches the explosive. It must not burn too rapidly, for the operatives must have time to seek a place of safety.

Now, the declaration shows that the fuse was lighted in the first place in the ordinary way and according to approved methods, and that when so lighted it failed to fuse and smoke in the

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ordinary way; that supposing that the fuse had not taken fire, the plaintiff undertook to light it a second time; that it again failed to show any sign of being lighted, as it should have done, and appeared to go out; whereupon the plaintiff, supposing that the fuse had not taken fire, frazzled the end in the ordinary and customary way, and again applied the blaze, and again the fuse failed to respond; whereupon he again frazzled the end of the fuse and applied the blaze the fourth time, and immediately upon the application of the blaze the explosion took place.

It does not appear from the declaration of what length the fuse was, or how rapidly a good fuse should have transmitted the fire, after its ignition, to the explosive—that is to say, how soon after the ignition the explosion should have occurred; but it is certain that the fuse took fire at some one of the efforts to fire it antecedent to the last, for when the fourth attempt was made, after having frazzled the fuse the second time, the declaration alleges that the explosion *immediately* took place. “Immediately” means at once; without interval of time. Webster’s Dict. A fuse which would cause an explosion at once would certainly be defective—not because it failed to produce an explosion, but because it produced an explosion immediately—that is to say, without such interval of time as would enable the operative to seek a place of safety.

If the explosion was not the result of the final effort to ignite the fuse, then it must have been lighted as the result of one of the previous efforts, perhaps the first, or it may be the second. As we have said, the length of the fuse is not determined, nor is the proper rate at which a suitable fuse will transmit fire after it is ignited anywhere stated in the declaration. The only evidence of the insufficiency of the fuse and its want of adaptation to the use for which it was intended is that it “failed to fuse and smoke in the ordinary way.” As it was in point of fact ignited (otherwise the explosion would not have occurred), its failure to smoke, so far from being proof of defect, is rather to be taken as proof to the contrary, for smoke is

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the result of imperfect combustion (Ency. Britannica, vol. 22, p. 180); whereas fire accompanied by the least amount of smoke is evidence of the most complete combustion of the material used in making the fire.

Nothing could have been more imprudent and reckless than the conduct of the plaintiff. To put flame or fire to a fuse connected with dynamite, the object of which was to explode the dynamite, and to remain by it until the explosion occurred, upon the unwarranted assumption that the fuse was defective, instead of seeking a place of safety and there awaiting the result, was to invite and court disaster.

We are of opinion that the contributory negligence of the plaintiff was the proximate cause of the accident, and that the demurrer to the declaration was properly sustained.

The judgment of the Circuit Court is affirmed.

*Affirmed.*

Syllabus.

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**Richmond,**

**D. S. COOK & SON MINING Co. v. THOMPSON.**

November 18, 1909.

Absent, Buchanan, J.

1. **CORPORATIONS—Foreign Corporations—What Constitutes—Resident Agent—Attachments.**—A corporation chartered and organized under the laws of another State, and holding no charter from this State, is a foreign corporation, although it has an agent, appointed under the requirements of the statute of this State, upon whom process may be served; and the fact that it is such foreign corporation is all that is required by section 2959 of the Code to justify the issuing of an attachment against its property.
2. **PLEADING—Declaration—Sufficiency.**—A declaration is sufficient which sets out with fullness and clearness every essential fact necessary to apprise the defendant of the nature of the demand against him, and to enable the court to say, upon demurrer whether, if the facts stated are proved, the plaintiff is entitled to recover.
3. **WITNESSES—Opinions—Custom of Business—Location of Dynamite Thawer.**—Where the negligence charged against a mining company is that it placed its dynamite thawer in dangerous proximity to its employees, a witness who is experienced in such matters may be asked by the plaintiff what distance it was customary for miners to place their dynamite thawer from the men at work. If he answers "a safe distance," he may be asked further to explain what he means by "a safe distance," as the answer stating the distance is not the expression of an opinion by the witness, but a statement of what the customary distance was.
4. **WITNESSES—Contradiction—Location of Dynamite Thawer.**—Defendant having introduced evidence tending to show that there was no other suitable place at which its dynamite thawer could have been placed than near the men at work, it was clearly competent for the plaintiff to contradict that evidence by testimony showing that there was a suitable place out of reach of the men at work.



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5. APPEAL AND ERROR—*Instructions—Harmless Error*.—A case will not be reversed for rulings on instructions where it appears that the jury were fully instructed on every phase of the case, and it does not appear that the jury could have been misled, or that the losing party was in any way prejudiced by them.
6. APPEAL AND ERROR—*Verdicts—Evidence to Support*.—The verdict of a jury will not be set aside on writ of error where the evidence tends to support their finding.

Error to a judgment of the Circuit Court of Botetourt county in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

*Affirmed.*

The opinion states the case.

*Benjamin Haden*, for the plaintiff in error.

*C. M. Lunsford* and *Wm. R. Allen*, for the defendant in error.

HARRISON, J., delivered the opinion of the court.

Caliph Thompson, an infant, suing by his father as next friend, brought this action to recover of the plaintiff in error damages for injuries suffered by him, which it is alleged were occasioned the plaintiff by the negligence of the defendant company.

There was a verdict for \$1,500.00 in favor of the plaintiff, which the circuit court refused to set aside, and we are asked to review the judgment rendered upon that verdict.

The defendant company was a New Jersey corporation, doing business in Virginia, and upon the institution of this suit a foreign attachment was issued and levied upon its real estate in the county of Botetourt. The motion of the defendant company to quash this attachment was overruled, and this action of the court is made the subject of complaint.

All that is required under section 2959 of the Code for the issuing of an attachment is to show that the defendant is a foreign corporation, and it is not denied that this corporation

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was chartered and organized under the laws of the State of New Jersey, and has no charter from the State of Virginia.

In the case of *Cowardin v. Universal Life Ins. Co.*, 32 Gratt. 445, this court said: "Nothing is better established by all the cases and text-writers on the subject of corporations, than that a corporation can have no legal existence outside of the boundaries of the sovereignty by which it was created. While it may, by its agents, transact business anywhere, unless prohibited by its charter or prevented by local laws, it can have no residence or citizenship except where it is located by or under the authority of its charter."

That was the case of an insurance company, and the statute required every such foreign company doing business in this State to appoint an agent upon whom process might be served in any action brought against it. The provisions of sections 1103 and 1104 of the Code have extended the same requirement to other corporations.

There is no merit in the objection taken to the action of the court in overruling the demurrer to the amended declaration.

The case at bar is similar in essential details to the case of *Lane Bros. Company v. Seakford*, 106 Va. 93, 55 S. E. 556; and the amended declaration in this case is practically a copy of the amended declaration in that case, which this court has considered and held to be sufficient.

It is not necessary to recite with more detail the averments of the declaration in the case at bar. It sets out with fullness and clearness every essential fact necessary to apprise the defendant of the nature of the demand against it, and to enable the court to say, upon demurrer whether, if the facts stated are proved, the plaintiff would be entitled to recover. *Hortensine v. Va.-Carolina Ry. Co.*, 102 Va. 914, 47 S. E. 996.

It is further contended that the court erred in permitting the witness, Edward Dillon, to testify that it was customary, in mining operations, to keep a dynamite thawer a safe distance

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from the men at work, and that a safe distance would be 200 feet.

One of the chief grounds of negligence relied on is that the defendant placed its dynamite thawer in dangerous proximity to its employees. The witness, Dillon, was experienced in such matters, and was called upon to state the general custom of persons in the business, as to the distance a dynamite thawer was placed from the point where the men were at work. He answered: "It is customary to keep the thawer a safe distance from the working men." When asked to explain what he meant by a safe distance, he replied: "I should say 200 feet."

The questions and answers of the witness on that subject related solely to what the custom was among people engaged in the business. He was not asked what he regarded as a safe distance, but to explain what he meant by the use of the term, so as to get before the jury an intelligent understanding of what the customary distance was at which these thawers were placed from the men at work. The defendant asked for an instruction, which was given, telling the jury that "the unbending test of negligence in methods of machinery and appliances is the ordinary usage of the business." In the light of the rule here invoked, the testimony objected to was proper. *Bertha Zinc Co. v. Martin*, 93 Va. 807, 22 S. E. 869, 70 L. & A. 999.

J. W. Eggleston, a witness for the plaintiff, was asked: "Is there any place on the company's land where this thawer could have been placed that would have been out of reach of the people's place of work"; to which he replied: "Yes, sir." Allowing this question to be asked, and the answer to go to the jury, is assigned as error.

This objection is without merit. The petition admits that the tract of land in question was several miles long and that a thawer could have been placed on it out of the reach of persons at work. This being so, there was no objection to showing that fact to the jury. It was competent for the defendant to show that such places were not near enough to the works,

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and it cannot complain that the plaintiff did not question the witness on that subject. The defendant had introduced evidence tending to show that there was no other suitable place at which the thawer could have been placed, and it was clearly competent for the plaintiff to contradict that evidence with the testimony of the witness, J. W. Eggleston.

The action of the court in giving and refusing instructions is assigned as error.

The court gave eight instructions for the plaintiff and eleven for the defendant. It is useless to discuss in detail the several objections taken to these instructions. They were liberal to the defendant, and, taken as a whole, in connection with the pleadings and the evidence, they fairly cover every possible phase of the case, and it does not appear that the jury could have been misled, or that the defendant was in any way prejudiced by them.

It is finally urged that the court erred in refusing to set aside the verdict, because it was contrary to the law and the evidence.

The plaintiff introduced evidence to show that the injuries he had suffered were the result of the negligence of the defendant company in two particulars: First, in placing its dynamite thawer so near the train track and tunnel of the mine as to endanger the lives of those who had to work there, thus rendering the place unsafe and dangerous; second, in putting the dynamite thawer in charge of an unusually ignorant boy, only fourteen years of age, without experience in or knowledge of the use, nature and dangers incident to the handling of dynamite.

The evidence tends to establish the negligence of the defendant in both of these particulars, and upon well settled principles the verdict based upon that evidence cannot be disturbed.

For these reasons, the judgment complained of must be affirmed.

*Affirmed.*

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Opinion.

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**Richmond.**

## HUGHES AND OTHERS v. PEEBLES AND OTHERS.

November 18, 1909.

Absent, Buchanan, J.

1. COUNTY TREASURERS—*Commissions on County Levies.*—In computing the treasurer's commissions for collecting and disbursing the country levy, the district school levy, and the road levy—the law on the subject being in doubt and uncertainty—the several sums comprising these levies should be segregated and a commission allowed upon each of the several items for the years prior to the year 1904, in accordance with the construction generally acted on by treasurers and acquiesced in by the public; but for the year 1904 and subsequent years, they should be aggregated as it is expressly provided by statute (section 1515, Code 1904) that "in computing the commissions for collecting and disbursing all sums levied for county, school, and district purposes, the amount shall be treated as one sum, and shall not be divided for the purpose of calculating the treasurer's commissions."

Appeal from a decree of the Circuit Court of Nelson county.  
Decree for defendants. Complainants appeal.

*Affirmed.*

The opinion states the case.

*Brown & Brown* and *George E. Walker*, for the appellants.

*Caskie & Coleman*, for the appellees.

KEITH, P., delivered the opinion of the court.

Hughes and others, citizens and taxpayers of the county of Nelson, filed their bill on behalf of themselves and others similarly situated against J. R. Peebles, treasurer of Nelson county.

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and the board of supervisors and county school board of said county, from which it appears that for a long time past Peebles had been treasurer of Nelson county, and that from the year 1891 to 1906, both inclusive, he had each year withheld large sums of money which it was his duty under the law to carry forward as a credit in favor of Nelson county; the sums thus withheld aggregating \$3,991.25. The bill charges that between the years 1891 and 1904 it was provided by law that where the aggregate county levies for any year were in excess of \$15,000, the treasurer should receive for collecting and disbursing it a commission of five *per cent.* on the first \$15,000 of levies, and on the excess over that sum a commission of three *per cent.*; that during the same period, where the county levies were less than \$10,000, the sole compensation of the treasurer for collecting and disbursing the levies should be a commission of five *per cent.* on all levies collected prior to December 1 of each year, and a commission of eight *per cent.* on all levies collected and disbursed after December 1; that the General Assembly of 1904 amended the law so as to allow a commission of three and one-half *per cent.* for collecting and disbursing all levies in excess of \$15,000, but in all other respects the law remained the same; that in the county of Nelson, for the years 1891 to 1906, both inclusive, the county levies collected by Peebles, treasurer, and disbursed, as aforesaid, were in excess of \$15,000, and therefore the commission allowed to the treasurer would be five *per cent.* on the first \$15,000 of levies, and three *per cent.* on all sums in excess of that amount, and for the years 1905 and 1906 a commission of three and one-half *per cent.* on such excess; and yet, the bill charges that the treasurer, in computing his commissions on said levies, deducted and reserved to himself a commission of five *per cent.* on all sums collected prior to December 1 of each year, and a commission of eight *per cent.* on all sums collected after December 1; a commission of eight *per cent.* being deducted upon the theory that each of the funds constituting the county levies, towit: the county levies proper, the school fund

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and the road levy, each being less in amount than \$10,000, though the three combined were in excess of \$15,000, the eight *per cent.* rate of commission and compensation was warranted by law.

The treasurer settled his accounts regularly, as required by law, and it was not until October, 1907, that the facts above stated came to the knowledge of complainants, for they relied upon the board of supervisors, the county school board, and the Commonwealth's attorney of Nelson county to guard the interests committed to their care. At the January, 1908, meeting of the board of supervisors a resolution was adopted employing C. H. Sackett, an expert accountant, to examine and report what liability, if any, rested upon the treasurer by reason of any sums collected by him and not properly accounted for. In July, 1908, the accountant filed his report before the board of supervisors, showing that, in his opinion, large sums had been illegally retained by the treasurer from year to year, the amounts corresponding substantially with the charges made by the complainants in their bill.

The supervisors took this report under consideration, and complainants appeared before them in person and by counsel and urged that the treasurer be required to make good to the county all sums illegally withheld by him by way of commissions and otherwise. The treasurer also appeared in person and by counsel and resisted the demands of the complainants. Thereupon the board, over the protest of the complainants, adopted a resolution, that if the treasurer should refund the amounts illegally withheld for the years 1904, 1905 and 1906, the board would not require him to refund any further sums, thus in effect ignoring the demands of complainants.

The complainants thereupon determined to file their bill, and after the writ in this cause had issued, the attorney for the Commonwealth of Nelson county, acting under a resolution of the board of supervisors, instituted his action at law, in the name of the board of supervisors, against the treasurer and his sureties,

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the object of which was to recover so much of the county and road levies as were unlawfully withheld for the years 1904, 1905 and 1906.

The bill alleges that it would be useless that two proceedings seeking the same end in part should progress at one and the same time, and inasmuch as their suit includes the entire ground covered by the action at law and much more, they pray that all proceedings in said action be stayed and enjoined, and that they be granted general relief in the premises, and to that end S. B. Whitehead, attorney for the Commonwealth for Nelson county, and the board of supervisors be served with proper process.

The defendants appeared and demurred to this bill; and, the cause coming on to be heard before the Honorable Daniel A. Grimsley, the demurrer was sustained and the bill dismissed, and to that decree an appeal and supersedeas were allowed.

There is no controversy with respect to the State revenues collected and disbursed by the treasurer of Nelson county. As treasurer, he collected certain county levies, which are taxes laid by the board of supervisors for the use and benefit of the county. There were certain levies also made by the school boards of the county for school purposes, and by the road boards of the several districts, these school boards and road boards being separate and distinct legal entities, and for the several sums thus collected and disbursed it was the duty of the treasurer to state and settle his accounts. The sole question for determination is whether or not, in computing his commissions, these several sums comprising the county levy, the district school levy and the road levy should be brought together and a commission allowed upon the aggregate sum, or be segregated and a commission allowed upon each one of the several items.

We do not deem it necessary to inquire into the state of the law prior to the Code of 1887, except to say that by an act passed by the General Assembly in 1879—Acts of Assembly, 1878-9, p. 318, prescribing the duties, powers and compensation of certain county officers—it was provided in the fifteenth section that



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the treasurer "shall be allowed for his services in receiving and disbursing the county and school levies, *which shall be considered to embrace all moneys collected by order of the county authorities for any purpose*, the same rate of compensation as is fixed by the thirtieth section of this act for receiving and paying over the revenue." This section passed into the Code of 1887 as section 614, which provides that "the county treasurer shall be allowed for his services in receiving and disbursing the county and school levies, *including all moneys collected by the order of the county authorities for any purpose . . . the* same rate of compensation allowed by the preceding section for receiving and paying over the revenue, except that for amounts over \$15,000 he shall be allowed three *per cent.*," etc.

The amendment in the Acts of 1878-9, which, as we have seen, passed substantially into section 614 of the Code of 1887, leaves the matter here in controversy in doubt and uncertainty. It continues to be open to question whether the county levies, the school levies and the road levies should be aggregated or segregated in the computation of commissions for their collection and disbursement.

By an amendment which has passed into the Code of 1904 as section 1515, the controversy is put at rest, for it is there declared, among other things, that "in computing commissions for collecting and disbursing all sums levied for county, school and district purposes, the amounts shall be treated as one sum, and shall not be divided for the purpose of calculating the treasurers' commissions."

That is plain, unequivocal language, which cannot be misunderstood, and leaves no room for construction.

The contention of the appellants is that this provision of section 1515 is but declaratory of the law. That position assumes the matter to be determined.

The learned judge who decided the case in the circuit court has not only had great judicial experience, but a wide acquaintance with the administration of affairs in this State, and in his

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written opinion, which we regret was not made a part of the record, but which we have seen and considered, he states as one of the reasons for his conclusion that it is in accordance with "the almost universal construction put upon it by public officers whose duty it was to enforce the statute, and acquiesced in by the public." "For I apprehend," says the learned judge, "that it was almost the universal habit of treasurers and boards of supervisors so to regard this statute, even after the amendment of 1878. It is true the bill charges that as far back as 1881 this question was raised in this county and an agreement of compromise was entered into between the parties in respect thereto, but what the exact question was and how it was finally settled is not definitely set out in the plaintiff's bill; so I have reached the conclusion that, down to the act of 1904, this was the proper construction of this statute, and so was almost universally regarded by public officers and acquiesced in by the public, and I am not disposed now to disturb it."

Our information as to the practice of treasurers in computing their commissions coincides with the views expressed by the judge of the circuit court.

It is not altogether clear what the true intent of the law was, but if a particular construction has been generally acted upon and acquiesced in for a long period, it would lead to great hardship and injustice now to disturb it. During all this period treasurers have been elected and re-elected, have stated their accounts before the boards of supervisors, who passed upon and approved them as being made in accordance with the law. To rip up those settlements at this late day might breed litigation that would extend to every county in this State, and cause great hardship to many innocent people.

We are of opinion that the decree should be affirmed, but without prejudice to the rights of the county of Nelson in its action at law against the treasurer and his sureties with respect to the levies of 1904, 1905 and 1906.

*Affirmed.*

Syllabus.

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**Richmond.**

HURRICANE LUMBER CO. v. LOWE.

November 18, 1909.

Absent, Buchanan, J.

1. STATUTE OF FRAUDS—*Sale of Standing Trees*.—A contract for the sale of trees and their immediate removal is a contract for the sale of personal property, and so is not within the statute of frauds.
2. EVIDENCE—*Admissibility—Harmless Error—Sale of Standing Trees*.  
Where, in an action to recover the price of standing trees sold by the plaintiff to the defendant, it is sufficient for the purpose of the plaintiff to show possession, the fact that the trial court permitted the plaintiff to offer in evidence a deed to himself from A, whereas, in a written agreement between the parties to the action it was stated that he claimed under B, was, at most, harmless error, where there was nothing in the bill of particulars filed by the plaintiff which required the exclusion of said deed.
3. PLEADING—*Grounds of Defense—Amendment—Accident—Mistake*.  
A motion to amend the statement of grounds of defense is addressed to the sound discretion of the court and should generally be allowed where any element of accident, surprise or mistake renders it advisable to amend a pleading at trial, but it is properly refused where the new matter sought to be introduced has been known to the parties from the beginning of the action, and they simply neglected to insert it. Defenses not embraced in the statement, nor otherwise set out in the pleadings, cannot be made.
4. DEEDS—*Error in Recording—What Passes to Grantee and His Alienee*.—A purchaser of the *merchantable* timber on a tract of land cannot successfully defend an action for the purchase price thereof by showing a prior recorded deed from his vendor to another party conveying to him "the surface and merchantable timber" on the tract, when the vendor produces the original deed showing that the conveyance was in fact of the surface and *unmerchantable* timber, and that by mistake in transcribing the deed on the deed book the word "merchantable" had

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been substituted for "unmerchantable." The deed as executed and delivered shows what was actually conveyed, regardless of the error in recording, and the grantee therein did not take, and hence could not convey to another the merchantable timber on said tract.

5. **SALE OF STANDING TREES—Possession of Vendor—Statute of Frauds.**

A purchaser of standing trees, under a verbal contract, from one in possession thereof, who enters upon the land, cuts down the trees, carries them away and sells them, is bound to his vendor for the purchase price agreed to be paid therefor.

Error to a judgment of the Circuit Court of Buchanan county in an action of *assumpsit*. Judgment for the plaintiff. Defendant assigns error.

*Affirmed.*

The opinion states the case.

*M. O. Litz and Greever & Gillespie*, for the plaintiffs in error.

*Ayers & Smithdeal and H. A. & J. K. Routh*, for the defendant in error.

KEITH, P., delivered the opinion of the court.

This is an action of *assumpsit*, instituted by Lowe to recover of the Hurricane Lumber Company and George J. Walker the value of certain trees sold by verbal contract, and cut down, removed and marketed by the defendants.

*Non-assumpsit* was pleaded, and the grounds of defense stated that, after the verbal contract the defendants discovered that these trees had been conveyed to one John Dotson by a deed of record; that the title to the land on which the trees grew was in litigation in an action of ejectment brought by Henry C. King in the United States Court for the Western District of Virginia, in which King had recovered the land and the timber thereon from one Montville Hunt, under whom plaintiff claimed; and that the judgment in King's favor had been affirmed by the Circuit Court of Appeals; that the contract sued upon, if it ever existed (which the defendants deny), was

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a verbal contract and void under the statute of frauds, no memorandum thereof having ever been reduced to writing and signed by the parties to be charged thereby, or their agents; and, finally, that the plaintiff never had any title to the timber trees, and is not entitled to recover in this action.

The jury rendered a verdict for the full amount of plaintiff's claim, \$1,223, and we are to review that judgment upon a writ of error.

There was evidence tending to prove all the averments of the plaintiff's declaration—that he had by verbal contract sold to Walker, acting for himself and the Hurricane Lumber Company, trees of the value ascertained by the verdict, all of which the defendants had cut, carried away, marketed and appropriated the proceeds to their own use, and upon demand being made therefor had refused to pay the price, assigning as a reason, and as the only reason at the time of the refusal, that plaintiff had conveyed the land and the timber which grew upon it to Dotson, by deed duly of record and prior in point of time to the contract under which Lowe claims.

It appears, then, that the evidence tends to prove a parol contract, executed in all its parts, except the payment of the purchase price of the subject of the sale.

In *Hurley v. Hurley*, ante, p. 31, 65 S. E. 472, it was held that plaintiff should have been allowed to prove purchase by him from defendant, by parol contract, of the trees in question, paying the purchase price in full; and that parol contracts for the sale of real estate are, under our statute, voidable only and not void.

That case is not complete authority in this, because that case came under section 1906-c of the Code, which provides, among other things, that where the owner of trees has adopted a brand or trade-mark, and impresses "such brand or trade-mark on a log, tree or other marketable timber (it) shall be deemed and held to be a change of ownership and possession."

While the timber in this case was selected, marked and the value of each tree computed by Lowe and the agent of the pur-

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chaser, it does not appear that any brand or trade-mark with respect to the trees was recorded, or indeed that any such brand or trade-mark as is contemplated by the statute had been adopted by Lowe.

The contract in this case contemplated the immediate severance of the trees from the land. This converted them into personalty; and, as is said in section 1286 of Minor on Real Property, "The doctrine generally recognized seems to be that in contracts for the sale of things growing upon the land (*fructus naturales*), if the vendee is to have a right to the soil for a time, for the purpose of further growth and profit of what is sold, it is an interest in the land, and must be proved in writing. But where the thing is sold in prospect of a separation from the soil immediately, or within a reasonable or convenient time, without any stipulation for the beneficial use meanwhile of the soil, but with a mere license to enter and take it away, it is to be regarded as a sale of goods only, and so not within the statute; and that notwithstanding the thing be at present attached to the soil, and although an incidental benefit may be derived to the vendee from the circumstance that the thing may remain for a time upon the land."

In support of the plea of the statute of frauds the plaintiffs in error, during the progress of the trial, objected to all the proof tending to establish a parol contract; and these exceptions are set out in bills of exception Nos. 2, 3, 4, 5 and 6. What we have said is sufficient to dispose of them all.

The seventh bill of exceptions is to the admission in evidence of a deed from Mrs. Kroll, which was objected to upon the ground that under an agreement in writing between the parties to the action it was stated that Lowe claimed under Montville Hunt; but the court overruled the objection and permitted the deed to be read to the jury.

It is true that the agreement referred to recites a recovery by King in the United States Circuit Court from Montville Hunt of the land upon which the timber in controversy grew, and

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that Lowe claimed under Hunt. It is not clear what the purpose was in introducing this deed, or what bearing it has upon the issue to be decided. There is, however, nothing in the bill of particulars filed by plaintiff which requires the exclusion of this deed. This is not an action of ejectment. It was sufficient for the purpose of the plaintiff to show possession, and the most that can be said with respect to the deed from Mrs. Kroll is that its admission was, it may be, harmless error for which a judgment otherwise proper should not be reversed.

Plaintiffs in error also sought to introduce proof that the lumber in question had been purchased from the Ritter Lumber Company, but this was objected to, for the reason that it was not stated under the grounds of defense filed by plaintiffs in error.

This is plainly so, as an inspection of the grounds of defense will show, and there was no error in the ruling of the court.

Thereupon the plaintiffs in error moved the court to be allowed to amend their statement of grounds of defense by inserting therein their claim under the Ritter Lumber Company.

This was also properly refused. Such an amendment is addressed to the sound discretion of the court, and should generally be allowed where any element of accident, surprise or mistake renders it advisable to amend a pleading at trial; but the fact here sought to be introduced, if it existed, must have been known to Walker and to the Hurricane Lumber Company from the beginning, and it was their own fault that it was not inserted in their grounds of defense.

It appears from the facts, however, that the real defense relied upon was to be found in the deed from Lowe to Dotson. Lowe was pressing for the money for his lumber, and Walker had drawn a check for the full amount when his counsel discovered upon the records a deed from Lowe to Dotson, dated the 17th of June, and acknowledged and recorded on the 14th day of August, 1905, by virtue of which Lowe conveyed with special warranty of title "the surface and unmerchantable timber stand-

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ing and being on said land and same being the land known as the Montville Hunt farm." By some accident it appears that when the deed went to record it was transcribed as conveying the surface and *merchantable* timber; and thereupon the check for the purchase money was withheld and the Lumber Company and Walker refused to complete their purchase by the payment of the price. Lowe produced the original deed and explained the mistake, but for reasons satisfactory to themselves the vendees still refused payment and repudiated the contract.

At the instance of the defendant in error the court instructed the jury that the deed to Dotson conveyed only the surface and unmerchantable timber, and reserved all merchantable timber; that the deed from Dotson to Walker, under which plaintiffs in error claim, conveyed only such timber as was not reserved by plaintiff in his deed to Dotson, and that Walker acquired no title to any merchantable timber; that if they believed from the evidence that the trees mentioned in the declaration were merchantable timber, standing on land conveyed by Lowe to Dotson, and that defendants purchased the trees from the plaintiff at a fixed price, under an agreement by which they were to be cut down and removed in a short time, and that they were cut down and removed as agreed, then the plaintiff is entitled to recover the price agreed upon with interest thereon from the time it should have been paid; that if they believed from the evidence that Walker bought the trees from the plaintiff as alleged in the declaration, and made out a check in full for the price and delivered it to defendant's attorney, to be delivered by him to the plaintiff after an examination of plaintiff's title, and further believe that upon an examination of the deed from Lowe to Dotson as it appeared of record in the clerk's office, said deed purported to convey the surface and all the merchantable timber, except such as had been sold, and that thereupon defendants declined to pay plaintiff for the timber, and thereafter attempted to purchase and acquire title thereto by the deed from Dotson to Walker, and that the defendants afterwards cut, re-



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moved and appropriated the timber and declined to pay plaintiff, for the reason that the deed from Lowe to Dotson, as recorded, purported to convey all merchantable timber as above stated, then, if the jury so believe, they should find for the plaintiff and fix his damages at the sum of \$1,223, with interest from the time said trees were removed by the defendants.

These instructions seem to us to be entirely proper, and they cover the case.

The instructions asked for by the plaintiffs in error rely upon the statute of frauds, and upon the proposition that the defendant in error could not recover under the second count in his declaration, for the reason that he failed to show title to the trees in controversy.

The trees were in the possession of defendant in error; the verbal contract with respect to them ascertained the trees that were sold and their value; and acting under and by virtue of this contract the plaintiffs in error entered upon the land, cut down, carried away and sold those trees. For reasons already given we are of opinion that under the circumstances disclosed by this record the contract, being for the sale of the trees and their immediate removal, was for the sale of goods only, and not of an interest in real estate, and so not within the statute of frauds.

We are of opinion that the jury were properly instructed; that the evidence is sufficient to support the verdict, and that the judgment should be affirmed.

*Affirmed.*

Syllabus.

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**Richmond,**

IVANHOE FURNACE CORPORATION v. CROWDER'S ADMINISTRATOR.

November 18, 1909.

Absent, Buchanan, J.

1. PLEADING—*Joint Action of Tort—Verdict Against One Defendant—Silence as to Another.*—In a joint action of tort against master and servant, a verdict against the master, making no mention of the servant, is equivalent to a verdict in favor of the servant.
2. VERDICTS—*Set Aside by Court of its Own Motion.*—It is entirely competent for the court, of its own motion, in a proper case, to set aside the verdict of a jury.
3. JOINT ACTION OF TORT—*Dismissal as to One Defendant—Master and Servant—Case at Bar.*—In a joint action of tort against master and servant, after a verdict against the master and in favor of the servant has been set aside, although the evidence disclosed no negligence on the part of the master except that imputed on account of the negligence of the servant, it is entirely competent for the plaintiff to dismiss the action as to the servant, as he might in the first instance have sued either or both of them.
4. PLEADING—*Arrest of Judgment—When it Lies—Case at Bar—Master and Servant.*—A motion in arrest of judgment lies only for error apparent on the face of the record. If a declaration against master and servant for the negligent killing of plaintiff's intestate charges negligence on the part of both defendants, and there is a verdict against the master only, and it appears solely from the evidence certified that the servant alone was negligent, this is not error apparent on the face of record, and hence a motion in arrest of judgment on this ground should be overruled.
5. PLEADING—*Judgment Non Obstante—When Given—Case at Bar—Master and Servant.*—A motion for a judgment *non obstante* is made in cases where, after a pleading by the adversary in confession and avoidance, and issue joined thereon and verdict for the adversary, the unsuccessful party, on retrospective examination of the record, conceives that such pleading was bad

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in substance and might have been the subject of demurrer on that ground. It will not be granted on the motion of the master in an action of case against master and servant where the trial is had on the general issue of not guilty, although the verdict is against the master alone, and the evidence shows that the servant only was guilty.

6. PLEADING—*Joint Tort—Dismissal as to One Defendant—Effect.*—If, in an action of tort against two defendants, a verdict in favor of one and against the other be set aside, and subsequently the action be dismissed as to one of the defendants, the case against the other defendant stands upon the record as though he alone had been sued.

Error to a judgment of the Circuit Court of Wythe county in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

*Affirmed.*

The opinion states the case.

*W. S. Poage and W. B. Kegley*, for the plaintiff in error.

*A. A. Phlegar and Oglesby & Harris*, for the defendant in error.

KEITH, P., delivered the opinion of the court.

Crowder's administrator sued the Ivanhoe Furnace Corporation and John Hocking in an action of trespass on the case, to recover damages for the death of his intestate by reason of the negligence of the defendants.

The Ivanhoe Furnace Corporation was engaged in mining and blasting rock; Hocking was one of its employees in charge of a number of laborers, whose duty it was to drill holes in the rock, load them with explosives, and cause them to be fired, for the purpose of blasting and removing the rock.

The declaration charges that on the 10th of September, 1907, a hole twelve feet deep had been drilled and loaded with dynamite, upon the top of which earth and gravel had been placed and tamped, and an unsuccessful effort had been made to fire

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and explode this charge. Thereupon John Hocking, as foreman, directed plaintiff's intestate and another laborer to remove the earth and gravel from the hole and furnished them with a drill with which to do the work, and while engaged in the performance of the work as directed the dynamite exploded with great force, and as a result plaintiff's intestate was killed.

We shall assume in the discussion of the question presented for our decision that Hocking, the employee of the Ivanhoe Furnace Corporation, was negligent; that his negligence caused the death of the plaintiff's intestate, and that the Ivanhoe Furnace Corporation was guilty of no other default or negligence save that which is imputed to it on account of the negligent act of its employee, Hocking.

When the case came on to be heard the jury returned a verdict as follows: "We, the jury, find for the plaintiff, and assess damages at \$3,500.00 against the Ivanhoe Furnace Corporation"; and thereupon the company moved the court in arrest of judgment and to enter judgment for the defendant, notwithstanding the verdict, and also moved the court to set aside the same because it was contrary to the law and evidence, and for misdirection of the court; which motions the court took time to consider.

The court overruled all of these motions, and entered judgment upon the verdict, to which the Ivanhoe Furnace Corporation duly excepted. This judgment was entered on the 29th of April, 1908, and on the following day, the court having further considered the matter, set aside the judgment against the Ivanhoe Furnace Corporation and that in favor of John Hocking. And thereupon the Ivanhoe Furnace Corporation renewed its several motions theretofore made, in arrest of judgment, and to enter judgment in its favor notwithstanding the verdict; but the court overruled these motions, and the defendant company again excepted; and thereupon, on the court's own motion, the verdict of the jury theretofore rendered was set aside, and a new trial awarded. To the action of the court in overruling its motion

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in arrest of judgment, and its motion to enter judgment in its favor notwithstanding the verdict, and in setting aside the verdict of the jury and awarding a new trial to John Hocking, the Ivanhoe Furnace Corporation again excepted.

At a subsequent term the plaintiff asked leave to dismiss its suit as to the defendant, John Hocking, which motion the Ivanhoe Furnace Corporation resisted; but the court overruled its contention and dismissed the suit as to John Hocking, and thereupon the defendant company moved that the suit be dismissed as to it, because it had been dismissed as to its codefendant. This motion was overruled; and thereupon came the jury, which rendered a verdict in favor of the plaintiff against the Ivanhoe Furnace Corporation for \$1,600, upon which judgment was entered, and the Ivanhoe Furnace Corporation again excepted; and the case is before us for review upon a writ of error.

We are of opinion (1) that the suit being against the Ivanhoe Furnace Corporation and John Hocking, and a verdict having been rendered against the Ivanhoe Furnace Corporation, which was silent as to John Hocking, was equivalent to a verdict in his favor; (2) that it was entirely competent for the court, of its own motion, in a proper case, to set aside a verdict; and (3) that inasmuch as it was optional with the plaintiff, upon the institution of this suit, to sue the Ivanhoe Furnace Corporation alone, or John Hocking alone, or to unite them as codefendants, the plaintiff was entirely within his rights, and the court committed no error in permitting the defendant in error to dismiss his suit as to John Hocking.

We are further of opinion that the court was guilty of no error in overruling the Ivanhoe Furnace Company's motion in arrest of judgment, which can only be resorted to in order to correct errors on the face of the record. *Gray v. Com'th*, 92 Va. 772, 22 S. E. 858, and cases there cited; 4 Min. Inst. (3d ed.), Pt. 1, 848.

The objection urged by plaintiff in error is that the verdict

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was in favor of Hocking and against the Ivanhoe Furnace Corporation; that the negligence which resulted in the accident was wholly that of Hocking; and that the defendant company was guilty of no negligence whatever other than that imputed to it on the principle of *respondeat superior*; and that it was a great hardship and injustice to hold the defendant company liable under such circumstances and to acquit its codefendant, who actually committed the wrongful act.

The declaration charges that it was the duty of the defendants and each of them to use reasonable care to provide a reasonably safe place and appliances for its employees, and that each of them wholly disregarded that duty, and negligently placed plaintiff's intestate to work in an unsafe place, "and negligently directed and required him to drill out and remove the tamping of earth and stone from a hole which was loaded with dynamite and powder, and thereby negligently exposed him to unnecessary and unusual danger, and negligently failed to warn and advise him of the danger and risk of the work to which they assigned him, of which danger they knew, or by the exercise of reasonable care would have known, and of which he was ignorant, and which he did in reliance upon the superior knowledge and experience of the defendants, and in obedience to their orders."

The declaration charges negligence upon the part of both of the defendants, and it appears from the evidence adduced before the jury and not from an inspection of the record that Hocking alone was guilty. The motion in arrest of judgment was, therefore, properly overruled. *Com'th v. Gray, supra*.

The motion for a judgment notwithstanding the verdict was properly overruled.

"A motion for judgment *non obstante* is made in cases where after a pleading by the adversary in confession and avoidance and issue joined thereon and verdict for the adversary, the unsuccessful party, on retrospective examination of the record, conceives that such pleading was bad in substance and might

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have been the subject of demurrer on that ground." 4 Min. Inst. (2d ed.), 771.

If the court had adhered to its original position and entered judgment upon the verdict for \$3,500, which was first rendered by the jury, and the case in that situation had been brought before us upon the petition of the Ivanhoe Furnace Corporation, *McGinniss v. Chicago & Rock Island Ry. Co.*, 200 Mo. 347, 98 S. W. 590, 9 L. R. A. (N. S.) 880, 118 Am. St. Rep. 667, and *Doremus v. Root*, 23 Wash. 710, 63 Pac. 572, 54 L. R. A. 649, relied upon by plaintiff in error, would have been pertinent and entitled to very grave consideration; but the case before us differs materially from the cases cited. The entire verdict first rendered by the jury in favor of Hocking and against the Ivanhoe Furnace Corporation was set aside, and became as though it had never existed. Then, upon motion of the plaintiff, the suit against Hocking was dismissed, and the case against the Ivanhoe Furnace Corporation stood upon the record as though it alone had been sued.

What we have said presents our views upon all of the questions involved in the first trial, with respect to which we are of opinion that the court committed no error.

As to the second trial, no error is assigned, and the judgment of the circuit court is, therefore, affirmed.

*Affirmed.*

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**Richmond.**

JACKSON AND OTHERS v. JACKSON AND OTHERS.

November 18, 1909.

Absent, Buchanan, J.

1. PARTITION—*How Made—Allotment of Part and Sale of Residue.*

The whole subject of the partition of real estate is regulated by statute in this State. Under the provision of the statute allowing "allotment of part and sale of the residue," the part allotted must (in the absence of consent of parties) be divided in equal portions, as near as may be, among all those entitled to share in it, and the residue be sold and the proceeds divided according to the respective rights of the parties. It is not permissible to allot in kind to some, and sell the shares of others for the purpose of distribution.

Appeal from a decree of the Circuit Court of Augusta county. Bill filed by Jesse Jackson for partition of real estate descended from his father. Exceptions were filed to the report of commissioners making partition by the complainant and several of the defendants. These exceptions were overruled, and the exceptors appeal.

*Reversed.*

The opinion states the case.

*Quarles & Pilson*, for the appellants.

*John B. Cochran*, for the appellees.

KEITH, P., delivered the opinion of the court.

The object of the bill in this case was to have partition of the real estate of Thomas J. Jackson, deceased, among his seven children; and by decree of the October term, 1908, Commis-



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sioner Gordon was directed to inquire "whether the real property in the bill mentioned can be conveniently divided in kind between the several parties entitled to share therein, any two or more of the parties, if they so elect, to have their shares laid off together when partition may be conveniently made in that way. If said real estate cannot be conveniently divided in kind, whether any party will take the entire property and pay therefor to the other parties such sums of money as their interests therein may entitle them to; and, if the same cannot be conveniently divided in kind, if no party will take the entire property and pay the others for their shares, whether the interest of those who are entitled to the said property, or its proceeds, will be promoted by a sale of the entire property, or by the allotment of part and sale of the residue."

The commissioner reported the principles covering the case as follows: "That there must be partition in kind among the tenants (where such partition is specifically insisted on), if such partition be practicable by any reasonable and fair device which commends itself to the conscience of the court as equalizing the several interests; and that, therefore, the two defendants, owners of the three-sevenths interests, are entitled to have their three shares laid off to them together, if this can be done with due regard to the rights of the other tenants, either by setting off a smaller quantity of more valuable land against a larger quantity of less valuable land, or by equalizing a more valuable portion by a charge upon it in favor of those getting the less valuable portion; and this, too, independent of the question of whether the court will order the sale of the interests of the tenants owning the other four-sevenths or not."

It appears that one of the cotenants, Ernest M. Jackson, sold his undivided interest to his brother, J. N. Jackson, who became entitled to two-sevenths of the entire subject; and thus J. N. and John W. Jackson, his brother, became entitled to three-sevenths, which they were willing to have set apart in one parcel.

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To this report of the commissioner exceptions were filed by appellants, and the court, overruling the exceptions, confirmed the report, and by its decree directed five commissioners to go upon the land and lay off the three-sevenths belonging to J. N. and John W. Jackson in one parcel, if that could be done without injury to the residue of the tract, having regard to the quantity, quality and value, and to partition the remaining four-sevenths into four equal parts, and assign one of said four-sevenths to each of the four remaining heirs, Jesse, Winifred, Harriet and Caroline Jackson; but if the commissioners should find it impracticable to assign the three-sevenths to J. N. and John W. Jackson without doing injury to the residue of the tract, they are required to report the facts upon which their opinion is based to the court. And if the commissioners find it practicable, and it can be conveniently done, to assign said three-sevenths to J. N. and John W. Jackson without doing injury to the rest of said tract, they are to make said assignment, but if they find it impracticable to partition the remaining four-sevenths into four equal parts, having regard to quality, quantity and value, and are of opinion that it would promote the interest of said four heirs to make sale of their four-sevenths, then the commissioners will report the facts upon which their opinion is based to the court, and what in their opinion is the fee simple value of the whole of the real estate of which T. J. Jackson died seised and possessed."

The commissioners reported as follows: "We do not think it would be to the best interest of all parties interested in said land to make sale of the same as a whole, as the land can easily be divided into two parts without detriment to either share, by assigning to J. N. and John W. Jackson three-sevenths," and four-sevenths to the four remaining heirs; that the farm is supposed to contain 186 acres, and they assign to J. N. and John W. Jackson three-sevenths in value, containing about sixty-five acres, and the other four-sevenths, or 121 acres, were assigned to Jesse, Winifred, Harriet and Caroline Jackson. They fur-

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ther reported that the four-sevenths interests thus assigned were not susceptible of division, but could be sold as a whole to a better advantage to the parties to whom this share was allotted.

To this report Jesse Jackson filed exceptions. We shall only consider the fourth, as it brings fairly before the court the issue of law to be determined in this controversy. The exception is in these words: "Because the commissioners allotted part of the farm to some of the parties and recommended a sale of the residue for the benefit of the other parties, which is in violation of the statute."

The whole subject is regulated by statute, which will be found in chapter 114 of the Code of 1904.

By section 2563 it is provided that "Any two or more of the parties, if they so elect, may have their shares laid off together when partition can be conveniently made in that way."

And section 2564, or so much of it as is pertinent to this case, provides that "When partition cannot be conveniently made, the entire subject may be allotted to any party who will accept it, and pay therefor to the other parties such sums of money as their interest therein may entitle them to; or in any case now pending or hereafter brought, in which partition cannot be conveniently made, if the interests of those who are entitled to the subject, or its proceeds, will be promoted by a sale of the entire subject, or allotment of part and sale of the residue, the court . . . may order such sale, or such sale and allotment, and make distribution of the proceeds of sale, according to the respective rights of those entitled."

This controversy turns upon the interpretation to be given to the words "allotment of part and sale of the residue." In the case before us there were seven shares originally. Three of these shares could be laid off together in kind; the other four shares could be laid off together, but were not susceptible of partition in severalty among the four to whom they were to be assigned. The circuit court was of opinion, and so decreed, that under the statute it could allot three shares to the two parties entitled to them in kind, and as the other four shares were

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not susceptible of partition, they could be sold and the proceeds divided among those entitled; but we are of opinion that the language of the statute does not bear that construction. When it speaks of an allotment of part, it is intended that that portion of the subject of which partition can be conveniently made in kind should be divided in equal portions, as near as may be, among all those who are entitled to share in the partition; and that, in order to reach equality among those entitled, the court has the power in a proper case to charge the more valuable shares with a sum payable to those to whom the less valuable shares may be allotted; and that so much of the subject as cannot be conveniently partitioned must be sold and the proceeds divided according to the respective rights of the parties.

1 Minor on Real Property, sec. 963, says that when partition cannot conveniently be made otherwise, the entire subject may be allotted to any party who will accept it, and pay therefor to the other parties such sums of money as their interests therein may require; or the entire subject may be sold and the proceeds divided; or part may be allotted and the residue sold; and any two or more of the parties, if they so elect, may have their shares laid off together, when partition may be conveniently made in that way; sale of the entire subject, or the allotment of part and the sale of the residue, and the distribution of the proceeds of sale may be made by the court according to the respective rights of those entitled; and where partition in severalty is impracticable, or cannot be made without impairing the portions of some or all of the parties, then nothing remains but to resort to one or other of the devices above stated, as, for example, by dividing the property into shares of unequal value, and correcting the inequality by charging money on the more valuable in favor of the less valuable portion, or by a sale of the whole and a distribution of the proceeds.

In Hogg's Eq. Principles, sec. 372, it is said: "Where the court does determine upon a sale of the land, it should be sold as a whole (in the absence of the consent of the parties in in-

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terest to the contrary), as it would not be just to sell as to some and decree a partition as to others." And this view is held by the Supreme Court of West Virginia in *Stewart v. Tenant*, 52 W. Va. 559, 44 S. E. 223.

In *Zirkle v. McCue*, 26 Gratt., 517, Judge Staples uses the following language: "The commissioners do not partition the residue of the tract among the heirs according to their respective interests—they do not recommend it—they do not intimate that it could be conveniently done. What they did do was to divide the tract into two parcels of two hundred and forty acres, each equal in value, these parcels to be sold, or one of them to be allotted to four heirs, who may unite in taking it as coparceners, and the other to be disposed of in the same way. Of course this plan was not feasible unless all the parties consented to its adoption. They did not consent to it, and, of course, it was abandoned."

In *Beckham v. Duncan*, 1 Va. Dec., 669, 5 S. E. 690, it appears that a tract of land was to be partitioned, three-fourths of which belonged to Coleman C. Beckham, and the remaining one-fourth belonged to his children. Commissioners were appointed to make partition of the land, and they reported that they had allotted three-fourths of the estate to Coleman C. Beckham and the remaining one-fourth to his children, but they found it impracticable to subdivide the one-fourth so allotted. Exceptions were taken to this report, which need not be specifically stated. The court overruled these exceptions and decreed a sale of the whole of the real estate. So much of the opinion as throws light upon the subject before us is as follows: "The commissioners presumably were selected with reference to their supposed qualifications for the service to be performed, and in their report to the court, made upon oath, they are very emphatic in the opinion that it was impracticable to subdivide the one-fourth interest in Ashland which they had allotted to the children of Coleman C. Beckham, and they gave the reasons for their conclusion, which, in the absence of evidence to the contrary, must

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be accepted as sound. It is true the general rule is that, in the partition of land each cotenant has the right to have his share assigned to him in severalty. But this is only where such allotment can be made without material injury to the interests of all concerned; and in the present case the facts disclosed by the record justified, and even required, a departure from the general rule, since it appears that a sale of the interest of one of the children was necessary to satisfy the liens upon it, and a subdivision was impracticable. It was proper, therefore, for the court to confirm the report of the commissioners, and to direct a sale of the whole tract."

We are, therefore, of opinion that while under our statute power is expressly given to make "allotment of part and sale of the residue," the true rule, where the element of consent does not appear, is to divide the part allotted among all those entitled to share in it, and to sell the residue and distribute the proceeds of sale according to the rights of those entitled.

The decree of the circuit court must, therefore, be reversed.

*Reversed.*

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Syllabus.

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**Richmond,**

## KNIGHT AND ANOTHER v. GRIM AND ANOTHER.

November 18, 1909.

Absent, Buchanan and Cardwell, JJ.

1. APPEAL AND ERROR—*Grounds of Defense—Refusal to Require—When Harmless.*—Where it is manifest that the plaintiff was not embarrassed, hindered or prejudiced in any way by the refusal of the trial court to require the defendant to state his grounds of defense to an action of ejectment, the judgment will not be reversed on that account, as the error, if any, was harmless.
2. EJECTMENT—*Color of Title—Condemnation Proceedings—Adverse Possession—Parties.*—The record of condemnation proceedings, though defective, may, after final judgment therein, be introduced in evidence in an action of ejectment for the purpose of showing color of title, to be followed by proof that the defendant and those under whom he claims have been in the actual and adversary possession of the premises for the period prescribed by law. It is immaterial that neither the plaintiff nor those under whom he claims were parties to the condemnation proceedings.
3. EJECTMENT—*Color of Title—Record in Condemnation Proceedings—Final Judgment Therein.*—The filing of a petition to condemn land and the entry of an order appointing commissioners to ascertain the damages are not alone sufficient to constitute color of title which, if held adversely for the statutory period, will ripen into good title. There must, in addition, be a final judgment of the court fixing the amount of the compensation, and the payment of the same to the parties entitled thereto, or into court. Then for the first time does the record furnish color of title.
4. COLOR OF TITLE—*What Constitutes.*—Color of title is that which in appearance is title, but which in reality is no title at all. It is that which is apparently good title, but which, by reason of some defect not appearing on its face, does not in fact amount to title.

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Error to a judgment of the Circuit Court of Clarke county in an action of ejectment. Judgment for the defendants. Plaintiffs assign error.

*Reversed.*

The opinion states the case.

*Whiting & Smith*, for the plaintiffs in error.

*Harrison & Lewis*, for the defendants in error.

HARRISON, J., delivered the opinion of the court.

The plaintiffs, J. Gover Knight and Juliet S. Knight, brought this action of ejectment to recover of the defendants, P. T. Grim and the School Board of Chapel District, a lot of land containing one-half acre, situated in the county of Clarke.

The claim of the plaintiffs rests upon a deed dated October 1, 1877, whereby George K. Anderson and wife conveyed to their father, William F. Knight, as trustee, a farm containing one hundred and forty-five acres, to be held by said trustee for the use and benefit of Elizabeth Gover, their grandmother, during her life, and at her death to pass in fee simple to the plaintiffs. Mrs. Gover died March 4, 1879. From that date, under the terms of the deed, the plaintiffs, who were then under age, became the fee simple owners of the farm, which included within its boundary the lot sought to be recovered in this action.

The claim of the defendants rests upon the assertion of adverse possession under color of title for a sufficient length of time to bar the right of the plaintiffs to recover.

It appears that on June 7, 1886, more than eight years after the deed from Anderson and wife to the plaintiffs, and more than seven years after the plaintiffs had, by reason of their grandmother's death, become the fee simple owners of the land in question, the Board of Trustees of Greenway District filed an application in the clerk's office of the County Court



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of Clarke county, asking that one-half acre of this farm of the plaintiffs be condemned for free school purposes. At the July term, 1886, William F. Knight, who was then in possession of the farm, appeared in court by counsel and waived notice of the application to condemn; whereupon the court appointed commissioners to meet on the land and report to the court what would be a just compensation for the land proposed to be taken. When the commissioners filed their report in response to this order does not appear.

After the order appointing the commissioners was entered, no further action was taken in this condemnation proceeding until the August term, 1893, when the following order was entered: "In the matter of the application of the Board of School Trustees of Greenway District, in the county of Clarke, to condemn one-half acre of land held by W. F. Knight, trustee for his children, Beverly Randolph, J. W. Sprint and R. Powel Page, three of the commissioners appointed by the order of July, 1886, returned their report, and there being no exceptions thereto, the same is approved and confirmed; and it appearing to the court that the sum of \$200 ascertained by said report to be a just compensation to William F. Knight, trustee, for the land taken has been paid, it is ordered that the said report, together with the order appointing the said commissioners, be recorded in the proper deed book of this court, and that the title to the one-half acre of land mentioned in said report do vest in the Board of School Trustees for Greenway District, and this case is now retired among the causes ended."

At the time this final order was entered the plaintiffs were of age, but they were not then, nor had they at any time been made, parties to this proceeding.

It further appears that the School Board of Greenway District took possession of the lot in question in 1886, fenced it in, and by the latter part of that year or early in 1887 had built a schoolhouse thereon, which was in 1887 occupied for school purposes.

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By deed dated November 16, 1907, the School Board of Greenway District conveyed the lot in question to the School Board of Chapel District, after which the School Board of Chapel District sold the same at public auction to the defendant, P. T. Grim, and made him a deed therefor, dated May 1, 1908.

This action of ejectment was brought May 30, 1908, in which there was a verdict and judgment for the defendants, which this writ of error brings under review.

There was no error in the circuit court's refusal to require the defendants to file their grounds of defense. Whether or not section 3249 of the Code applies to actions of ejectment we need not decide. So far as this case is concerned it is manifest that the plaintiffs were not embarrassed, hindered or prejudiced in any way by the ruling complained of. *C. & O. Ry. Co. v. Stock*, 104 Va. 97, 51 S. E. 161; *Wallen v. Wallen*, 107 Va. 131, 57 S. E. 596.

The plaintiffs objected to the introduction of the condemnation proceedings, already mentioned, upon the ground that they were not parties to such proceedings, and could not be prejudiced by them. This objection was overruled, and the condemnation proceedings were permitted to go to the jury, only as showing color of title, to be followed by proof that the defendants and those under whom they claimed had been in the actual and adversary possession of the premises for the period prescribed by law.

There was no error in this ruling. When the condemnation proceedings were admitted as color of title the final order, confirming the report of the commissioners and reciting that the damages had been paid, had been entered. In that shape, however inadequate such proceedings may have been as showing good title, they were sufficient to show color of title from and after the date of the final order mentioned, of August, 1893.

In Lewis on Eminent Domain, Vol. 2, sec. 300-b, it is said that, "Under statutes quieting title to land after a certain length of possession under color of title, it is held that defective con-

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demnation proceedings may be color of title." Citing *Mobile, &c., R. Co. v. Cogsbill*, 85 Ala. 456, 5 South. 188; *Cogsbill v. Mobile, &c., R. Co.*, 92 Ala. 252, 9 South. 512. In these cases where the damages had been ascertained and the report confirmed, the record was admitted as showing color of title.

Over the objection of the plaintiffs the court gave for the defendants the following instruction: "If the jury believe from the evidence that the defendants, or those under whom they claim, have been in open, visible, continuous, notorious and hostile possession of the land described in the declaration, under claim or color of title, for a period of twenty years preceding the 30th of May, 1908, the date of the institution of this suit, they must find for the defendants."

This instruction was erroneous. It is not contended in this case that the lot in question was ever claimed other than under the condemnation proceedings, which are relied on as giving the defendants color of title. The instruction assumes that the condemnation proceedings prior to the order of August, 1893, constituted color of title. It in effect told the jury that the application to condemn, and the order appointing commissioners to ascertain the damage were alone sufficient to constitute color of title, under which, if the defendants held adversely for the statutory period, the plaintiffs could not recover.

The taking of private property for public purposes would be facilitated far beyond the inhibitions of the law if the mere filing of a petition to condemn and the entry of an order appointing commissioners to ascertain the damage in a proceeding to which the owners were not parties, stating that the property was needed for public purposes, would give color of title. There would be little protection for property rights under such circumstances. The application to condemn and the order appointing commissioners did not, standing alone, constitute color of title. No one could have been misled by such a record into relying upon it as vesting in him the ownership of the property.

Color of title is that which in appearance is title, but which

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in reality is no title at all. It is that which is apparently good title, but which, by reason of some defect not appearing on its face, does not in fact amount to title. Newell on Ejectment, p. 772, sec. 87; *Sulphur Mines v. Thompson*, 93 Va. 293, 25 S. E. 232.

In the case at bar the condemnation proceedings did not constitute color of title until after the order of August, 1893, was entered. Then for the first time did the record furnish any appearance of title. It was still defective, but that fact was not apparent on its face, and therefore it then constituted color of title.

In *Virginia-Carolina Co. v. Booker*, 99 Va. 633-637, 39 S. E. 591-592, this court, after stating how a party seeking to condemn land can get possession pending the proceedings, says: "But this gives the party condemning no title to the land until there is a final judgment of the court fixing the amount of the compensation, and the payment of the same to the party or parties entitled, or into court." Citing sec. 1083 of the Code.

While, therefore, the condemnation proceedings were admissible to show color of title in the plaintiffs, their operation as color of title could only be effectual from and after August, 1893, when for the first time the order then entered gave them the appearance of title.

This suit was brought May 30, 1908, less than fifteen years after the defendants had the right to rely upon the condemnation proceedings as color of title. It follows, therefore, that the defendants had not shown adverse possession under color of title for the statutory period, and hence the plaintiffs' claim was not barred.

In this view of the case it is unnecessary to consider other assignments of error.

The judgment complained of must be reversed, the verdict of the jury set aside, and the case remanded for a new trial not in conflict with the views expressed in this opinion.

*Reversed.*

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Syllabus.

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**Richmond.****McComb v. Gilkeson and Others.**

November 18, 1909.

Absent, Buchanan, J.

1. **VENDOR AND PURCHASER—*Sale by the Acre—Presumption.***—Courts of equity do not favor contracts of hazard, and every sale of real estate where the quantity is referred to in the contract, and the language of the contract does not plainly indicate that the sale was intended to be a sale in gross, is presumed to be a sale by the acre. The presumption against contracts of hazard can be effectually repelled only by clear and cogent proof, and the burden is always upon the party asserting a contract of hazard to clearly establish the assertion.
2. **VENDOR AND PURCHASER—*Contracts of Hazard—Sale by the Acre—Presumption—Case in Judgment.***—Where parties contract for the payment of a gross sum for a tract of land upon the estimate of a given quantity, the presumption is that the quantity influenced the price, and that the agreement was not one of hazard. Whether it be a contract for a sale in gross or by the acre depends on the intention of the parties to be gathered from the language of the contract and the surrounding facts and circumstances, but the court will always construe it to be a contract for a sale by the acre, unless the contrary clearly appears. The evidence in this case shows a sale by the acre, and that both parties were in good faith mistaken as to the quantity actually in the tract.
3. **VENDOR AND PURCHASER—*Sale of Land—Deficiency—More or Less—Case in Judgment.***—The language "more or less" used in contracts for the sale of land must be understood to apply only to small excesses or deficiencies attributable to variations of instruments of surveyors, etc. The use of these terms repels the idea of a contract of hazard and implies that there is no considerable difference in quantity. A deficiency of ten acres in a tract of land represented as containing two hundred and forty-five and one-fourth acres is not the small deficiency attributable to a variation of instruments.

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4. **VENDOR AND PURCHASER—Deficiency in Quantity of Land—Laches in Asserting Claim.**—There was no laches on the part of the purchaser, in the case in judgment, in asserting his claim for an abatement of the purchase price for land sold by the acre. He did so promptly on discovering the shortage. The suit in which the land was sold was still pending, all the parties were before the court, and a large part of the purchase money was still unpaid.
5. **VENDOR AND PURCHASER—Sale of Land—Deficiency—Mistake—Rights of Infants.**—The principle upon which courts of equity grant relief in cases of deficiency in the estimated quantity upon the sale of lands is that of mistake, and is as applicable where the rights of infants are involved as in other cases. An infant is as much bound as an adult by the decree of a court of equity which has jurisdiction of the subject matter and parties to the litigation.
6. **VENDOR AND PURCHASER—Deficiency in Quality of Land—Measure of Damages.**—The general rule of compensation or abatement for a deficiency in the quantity of a tract of land sold by the acre is according to the average value per acre of the whole tract, unless particular circumstances require a departure from that rule.

Appeal from a decree of the Circuit Court of Augusta county in a suit in equity wherein appellant filed a petition asking an abatement of part of the purchase price of a tract of land. From a decree dismissing the petition, petitioner appeals.

*Reversed.*

The opinion states the case.

*Robertson & Robertson*, for the appellant.

*Bumgardner & Bumgardner*, for the appellees.

HARRISON, J., delivered the opinion of the court.

This controversy involves the right of appellant to have the purchase price of a farm bought by him from the appellees abated because of a deficiency in the quantity; the claim being that the

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sale was by the acre and that the number of acres influenced the price.

It appears that David V. Gilkeson died intestate in March, 1871, seised of certain lands in Augusta county, which he held jointly with his brother, Andrew T. Gilkeson. About the year 1875 these lands were, by proceedings had in the Circuit Court of Augusta county, divided between Andrew T. Gilkeson and the widow and heirs of David V. Gilkeson. In that partition there was assigned to the widow and heirs of David V. Gilkeson the homestead tract, containing 245 $\frac{1}{4}$  acres, as shown by a plat and survey made by John G. Stover and filed in the partition proceedings. This Stover plat and survey is referred to in the present case as showing the number of acres the appellees owned, though the farm is generally spoken of in the record, in round numbers, as a "245-acre farm." This is the farm that belonged to and was sold to the appellant by the appellees, Mary E. Gilkeson, the widow of David V. Gilkeson, and her children, Emma L. Gilkeson and Mary J. Gilkeson, and her three infant grandchildren, David, Frederick and Edgar Guthrie, who represent the interest of their mother, who was Sallie L. Gilkeson, one of the three children of David V. and Mary E. Gilkeson.

For some time prior to 1905 this farm was in the hands of P. E. Wilson & Co., real estate agents, for sale. On April 27, 1905, the appellant submitted to these agents an offer for the farm. So far as necessary to be quoted, that offer was in these words: "I will give you eighty-two hundred and fifty dollars for the Mrs. M. E. Gilkeson farm of 245 acres, more or less, near Barterbrook, Augusta county, Va. Payable as follows: One-third cash, and the residue in one and two years, carrying 6 *per cent.* interest secured by vendor's lien."

This proposition was submitted to and accepted by the adult owners, and a friendly suit was brought to have the sale ratified on behalf of the three infant owners, in which the adult owners were the plaintiffs and the three infants were the defendants. In this case the sale was approved and ratified as to the infants,

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and W. N. Fishburne, the counsel for the owners, was appointed a special commissioner to unite, on behalf of the infants, with the adult owners in a deed conveying the land to the appellant. This deed, which was duly executed, conveys to the appellant "that certain tract of land, containing 245 acres, more or less, lying in Augusta county," and refers to the old Stover plat and survey which describes the land conveyed as containing  $245\frac{1}{4}$  acres.

After getting possession of the farm the appellant had it surveyed and found that it contained only  $233\frac{1}{4}$  acres. Thereupon he filed his petition in this suit, asking to be allowed a proper abatement on his purchase-money bonds.

After this petition was filed it was agreed by all parties that C. E. McCutchan, the county surveyor, should survey the land, and that the quantity ascertained by him should be taken as the true quantity for the purposes of this suit. This surveyor reported that the farm contained 235 acres and 39 poles, or 10 acres and 1 pole less than  $245\frac{1}{4}$  acres, which the appellant claims the farm was represented to contain.

Upon the final hearing the circuit court dismissed appellant's petition, holding that he was not entitled to any relief on account of the shortage in acres ascertained by the agreed survey of C. E. McCutchan.

This court has so often discussed this subject and laid down the principles governing this class of cases that the restatement of those principles must necessarily be repetition.

It is well settled that courts of equity do not favor contracts of hazard, and that every sale of real estate, where the quantity is referred to in the contract, and the language of the contract does not plainly indicate that the sale was intended to be a sale in gross, must be presumed to be a sale by the acre. The presumption against contracts of hazard can be effectually repelled only by clear and cogent proof, and the burden is always upon the party asserting a contract of hazard to adduce facts which clearly establish that assertion. Where the parties contract for



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the payment of a gross sum for a tract of land upon the estimate of a given quantity, the presumption is that the quantity influenced the price to be paid, and that the agreement was not one of hazard. Whether it be a contract in gross or for a specific quantity depends, of course, upon the intention of the contracting parties, to be gathered from the terms of the contract and all the facts and circumstances connected with it, but in the interpretation of such contracts the courts, not favoring contracts of hazard, will always construe the same to be contracts of sale per acre, wherever it does not clearly appear that the land was sold by the tract and not by the acre. *Berry v. Fishburne*, 104 Va. 459, 51 S. E. 827; *Watson v. Hoy*, 28 Gratt. 698.

There is no merit in the contention made by appellees that Wilson & Co., the real estate agents who effected the sale, were the agents of the appellant. The evidence establishes the contrary beyond any reasonable controversy.

That the appellant was influenced to make the purchase by the representation that the farm contained two hundred and forty-five acres and a quarter is abundantly and conclusively shown, apart from his own evidence to that effect. The evidence shows that the appellant made diligent inquiry as to the number of acres in the farm, and the real estate agents say that he laid great stress upon the acreage and would not have bought except for the representation that the farm contained  $245\frac{1}{4}$  acres. Mr. Wilson, one of the firm of Wilson & Co., says that he derived his information as to the contents of the farm from the owners and from the land books, which showed the farm to be assessed as containing  $245\frac{1}{4}$  acres. The old survey ascertained the acreage to be  $245\frac{1}{4}$  acres, and the court sold and conveyed to the appellant by that survey.

That the vendors believed that they owned and were selling  $245\frac{1}{4}$  acres of land does not admit of doubt. The record satisfactorily shows that it was the intent and belief of the court, of the adult heirs, and of the purchaser, that  $245\frac{1}{4}$  acres of land were being sold for \$8,250. As in the very similar case of *Wat-*

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*son v. Hoy, supra*, the record in the present case shows that all of the parties, from the commencement of the negotiations down to and including the deed executed by the adult parties and the commissioner of the court, estimated this farm as containing 245 $\frac{1}{4}$  acres, and that it was bought and sold as and for that quantity.

The appellees insist that the deficiency is so slight as to be covered by the application of the words "more or less."

In *Berry v. Fishburne, supra*, it is said: "The language *more or less*, used in contracts for the sale of land, must be understood to apply only to small excesses or deficiencies, attributable to variations of instruments of surveyors, etc. When these terms are used it repels the idea of a contract of hazard, and implies that there is no considerable difference in quantity."

A deficiency of about ten acres in a tract of land represented to contain 245 $\frac{1}{4}$  acres is not the small deficiency which the rule mentioned attributes to a variation of instruments. It is a substantial loss, and shows that a mistake has been made in estimating the quantity. There was no laches on the part of appellant in asserting his claim for abatement of the purchase money. He did so promptly after discovering the shortage. The suit was still pending and all the parties were before the court and a large part of the purchase money unpaid. *Watson v. Hoy, supra*.

It is suggested that part of this land belongs to infants, and that the abatement will be prejudicial to them.

The record shows that it was to the interest of the infants to unite with the adult owners in selling the farm containing 245 $\frac{1}{4}$  acres at \$8,250, and it is difficult to see why it would be disadvantageous to them to sell the farm at the same relative price when it is shown to contain only 235 acres and 39 poles. The principle upon which a court of equity gives relief in cases of deficiency in the estimated quantity upon the sale of lands is that of mistake, and no reason is perceived why, in such a case, a court of equity should allow infants to profit by a mistake the court has made in their favor to the prejudice of an innocent

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party any more than it would permit adults to take advantage of their mistake to the prejudice of the innocent victim of that mistake. When the court acquires jurisdiction of the subject and person, an infant is as much bound by its decree as an adult. *Zirkle v. McCue*, 26 Gratt., 517.

As to the measure of damages in a case like this the general rule of compensation or abatement is according to the average value per acre of the whole tract, unless particular circumstances require a departure from that rule. *Watson v. Hoy, supra*.

Whether or not there are any particular circumstances which take this case from under the operation of the general rule can be inquired into when the case goes back to the circuit court.

Upon the whole case we are of opinion that the appellant was entitled to a proper abatement of the balance of purchase money owing by him for the deficiency shown in the quantity of land bought by him, and, consequently, that the circuit court erred in dismissing his petition.

The decree complained of must be reversed, and the cause remanded for further proceedings in accordance with the views expressed in this opinion.

*Reversed.*

Statement.

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**Richmond.**

NATIONAL CAR ADVERTISING CO. v. LOUISVILLE AND NASHVILLE RAILROAD CO.

November 18, 1909.

Absent, Buchanan, J.

1. CORPORATIONS—*Charter Powers—Express and Implied.*—What is fairly implied in the charter of a corporation is as much granted as what is expressed, but the charter still remains the measure of the powers of a corporation, and the enumeration of these powers implies the exclusion of all others.
2. RAILROADS—*Exclusive Privileges—Ultra Vires Acts—Advertising.*—In the absence of charter power, express or implied, or of power conferred by general law, a railroad company chartered and doing business as a common carrier of passengers and freight cannot grant to any one the exclusive privilege of placing advertisements on its box cars. A contract for such privilege is *ultra vires* and void, and, if still executory, will not be enforced, nor will damages be given for its breach.
3. CONFLICT OF LAWS—*Policy of Forum—Railroads—Preferences.*—A contract made in another state which is opposed to the well defined public policy of this State, as disclosed by its statutes, will not be enforced in the courts of this State. A contract made in another state by which a common carrier gives to one person the exclusive right to place advertisements on its box cars, gives to such person an undue and unreasonable preference and advantage over others and is contrary to the public policy of this State, as declared by section 1294-c of Code (1904) and will not be enforced by its courts.

Error to a judgment of the Circuit Court of Wise county in an action of *assumpsit*. Judgment for the defendant. Plaintiff assigns error.

*Affirmed.*

The opinion states the case.

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*Bond & Bruce, C. H. Patteson and Fox, Pierce & Rowe*, for the plaintiff in error.

*Henry L. Stone, Charles T. Duncan and Ayers & Fulton*, for the defendant in error.

KEITH, P., delivered the opinion of the court.

Lovejoy, on the 21st of March, 1901, entered into an agreement with the Louisville and Nashville Railroad Company, a corporation created by the State of Kentucky, with its principal office at Louisville, which provides:

“That whereas Lovejoy is desirous of obtaining the exclusive right of using for advertising purposes all box cars controlled by the railroad; and

“Whereas the railroad, for and in consideration of the covenants and agreements herein contained, is willing to grant the said right to Lovejoy;

“Now, therefore, it is mutually agreed and understood by and between the parties hereto as follows:

“I. Lovejoy shall have the exclusive right of displaying advertisements upon all box cars controlled by the railroad, using, however, for this purpose, only the side doors of said cars. Said advertisements or signs shall be of a neat and durable character, and shall in no way interfere with the working of the door.

“II. Lovejoy shall affix and remove all signs and bear all expenses incidental to the carrying on of the business, except that the railroad shall, without charge, carry the material and furnish storage for the same, and transport the employees of Lovejoy, when engaged in this business, to and from the points designated by the railroad for affixing and removing of said signs.

. . . . .

“IV. The said party of the second part shall not during the term or continuance of this agreement, grant, give or let to any other person, firm or corporation the privilege of placing adver-

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tisements upon any part or portion of its box cars, nor shall it place any advertisements itself thereon.

“IX. This agreement shall take effect as between the parties hereto on the 21st day of March, 1901, and shall remain in full force and effect for a period of ten years, and may be renewed by Lovejoy for an additional period of fifteen years on the same terms and conditions. Any contract between Lovejoy and an advertiser affecting this agreement and made during the last year of it shall not be for more than one year. This agreement and provisions thereof shall be binding upon and inure in favor of the successors and assigns of the respective parties hereto.

“In witness whereof, Lovejoy has affixed his hand and seal, and the railroad has caused to be affixed its corporate name and seal by its duly authorized president and secretary hereunto and unto a duplicate copy hereof, this twenty-first day of March, 1901.”

By assignment the benefit of this contract passed from Lovejoy to the National Car Advertising Company.

The railroad company refused to comply with the terms of the contract, and thereupon this action of *assumpsit* was brought. The trial resulted in a judgment for the defendant, and the case is before us for review upon a writ of error.

A great many points were reserved during the course of the trial, and numerous errors are assigned; but we shall discuss only one of them.

To maintain the issue on the part of the plaintiff the contract between Lovejoy and the railroad company was offered in evidence. The railroad company objected to its admission, and in support of its motion to exclude offered the charter of the Louisville and Nashville Railroad Company, and sections 210 and 214 of the Constitution of Kentucky, section 3 of the Interstate Commerce Law, and subsection 3 of section 1294-c of Virginia Code, 1904. The contract was excluded and the plaintiff excepted.

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We think that the action of the court may be maintained upon two grounds.

First, the contract was *ultra vires*—that is to say, was not within the powers conferred by the charter of the defendant company.

In *Thomas v. West Jersey R. Co.*, 101 U. S. 71, 25 L. Ed. 950, the first syllabus is as follows: "The powers of corporations organized under legislative charters are only such as the statutes confer. Conceding that what is fairly implied is as much granted as what is expressed, it remains that the charter of a corporation is the measure of its powers, and that the enumeration of these powers implies the exclusion of all others." And in the course of his opinion Mr. Justice Miller speaks as follows: "The principle is that where a corporation, like a railroad company, has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions . . . is void as against public policy."

In 1 Elliott on Railroads (second ed.), sec. 379, it is said: "Where the contract is *ultra vires* in the proper sense of the term, then, as we have elsewhere shown, there can be no recovery upon it. The contract itself is void." And in the same section it is said: "Where there is an executory contract merely, there is no difficulty, for it is clear that such a contract cannot be enforced nor damages recovered for its breach."

In *Central Transp. Co. v. Pullman Co.*, 139 U. S. 24, 35 L. Ed. 55, 11 Sup. Ct. 478, the court said: "A contract of a corporation, which is *ultra vires*, in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void, and of no legal effect. The objection to the contract is, not merely that the corporation ought not to have

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made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it. When a corporation is acting within the general scope of the powers conferred upon it by the legislature, the corporation, as well as persons contracting with it, may be estopped to deny that it has complied with the legal formalities which are prerequisites to its existence or to its action, because such requisites might in fact have been complied with. But when the contract is beyond the powers conferred upon it by existing laws, neither the corporation, nor the other party to the contract, can be estopped, by assenting to it, or by acting upon it, to show that it was prohibited by those laws. . . . A contract *ultra vires* being unlawful and void, not because it is in itself immoral, but because the corporation, by the law of its creation, is incapable of making it, the courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, so far as could be done consistently with adherence to law, by permitting property or money, parted with on the faith of the unlawful contract, to be recovered back, or compensation to be made for it. In such case, however, the action is not maintained upon the unlawful contract, nor according to its terms."

In considering whether or not a contract is beyond the power of a corporation, it is true that what is fairly implied in the charter is as much granted as what is expressed, but the charter still remains the measure of the powers of the corporation, and the enumeration of the powers implies the exclusion of all others.

In the brief of plaintiff in error, many illustrations are given of contracts upheld by the courts which were not strictly within the express powers conferred by the charter; but in all the authorities cited in support of that proposition, whether of adjudicated cases or from text-writers, we think it will be found that



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the implied power was one in aid of an express power, and which inured to the good of the general public.

The illustrations given in Wood on Railroads, at sec. 170, that a railroad company may erect a telegraph line along its railway, as incidental to its primary business; that it may put up refreshment rooms along its line of railroad for the convenience of passengers, or hotels for a similar purpose, where the interests of the corporation and the traveling public require it, belong to this class. Nor do we object to the rule upon the subject, as stated in section 479 of Wood on Railroads, where it is said: "The general doctrine now upon this subject is well settled. The charter of a corporation, read in connection with the general laws applicable to it, is the measure of its powers, and a contract manifestly beyond those powers will not sustain an action against the corporation. But whatever under the charter and other general laws, reasonably construed, may fairly be regarded as incidental to the objects for which the corporation is created, is not to be taken as prohibited."

The law as stated in 10 Cyc., p. 1133, is along the same line.

The Louisville and Nashville Railroad Company was chartered by the legislature of Kentucky in 1850. The general purposes of its creation was the transportation of persons, merchandise and property. We have searched so much of the charter as appears in the record in vain for any provision which would sanction the contract under consideration. We cannot conceive to what power it is incidental, or in what respect it would promote the execution of the powers expressly granted, or be beneficial in any degree to the general public. It is purely executory, is not within the express powers, nor fairly to be implied from any provision of the charter as exhibited in this record.

We are further of opinion that it cannot be enforced in the courts of this State, because it is opposed to a well defined policy, as disclosed by our statute law.

In the Code of 1904, sec. 1294-c, subsection 3, it is provided that "It shall be unlawful for any transportation company to

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make or to give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or to any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.”

This section is similar to section 1208 of the Code of 1887, which was repealed by an act approved March 3, 1892—Acts 1891-2, p. 965. The third section of that act, however, is substantially the same as section 1208, and remained in force until it was itself repealed by the “Act concerning public service corporations,” approved January 18, 1904—Acts 1902-3-4, page 968—which has passed into the Code of 1904, and especially section 3, ch. 3, of that act, at pp. 974-975. The prohibition of undue and unreasonable preferences or advantages, the principle of equality, which is the basis of this legislation, is to be found as early as the Acts of 1866-7, p. 725, and the statutes upon the subject have been from time to time amended and expanded so as to be made more effectual, but the basic principle of equality and fair dealing has been preserved through all the changes that have taken place from its first introduction into our statute law.

The Constitution of Kentucky is to the same effect. Sec. 210 of that instrument provides that “No corporation engaged in the business of common carrier shall, directly or indirectly, own, manage, operate, or engage in any other business than that of a common carrier, or hold, own, lease, or acquire, directly or indirectly, mines, factories, or timber, except such as shall be necessary to carry on its business; and the General Assembly shall enact laws to give effect to the provisions of this section.”

Section 214 of that Constitution is as follows: “No railway, transfer, belt line or railway bridge company shall make any exclusive or preferential contract or arrangement with any individual, association or corporation, for the receipt, transfer, delivery, transportation, handling, care or custody of any freight, or for the conduct of any business as a common carrier.”

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So that we do not incur the danger of refusing to enforce a contract which is valid under the laws of Kentucky. It is probable that this contract would be condemned by the laws of that State. But however that may be, we are of opinion that it cannot be enforced in the courts of this Commonwealth, because of the public policy of this State, as shown by the statutes to which we have referred.

In Minor's Conflict of Laws, sec. 5, p. 9, it is said: "It is generally considered that the municipal law of the State where the question is raised (*lex fori*) forbids the enforcement of a foreign law (1) where its enforcement would contravene some established and important policy of the State of the forum; . . ."

The contract before us is made with a transportation company, or, to use the language of the Acts of 1891-2, with a common carrier. It gives an undue and unreasonable preference to the plaintiff, the National Car Advertising Company. By its first section it provides that Lovejoy (and the plaintiff as his assignee) shall have the exclusive right of displaying advertisements upon all box cars controlled by the railroad company, using, however, for this purpose only the side doors of said cars; and by section 2 it is provided that the railroad company shall, without charge, carry the material and furnish storage for the same, and transport the employees of Lovejoy, when engaged in this business, to and from the points designated by the railroad for affixing and removing said signs. These provisions give to the plaintiff exclusive privileges, which constitute an undue and unreasonable preference and advantage, and come within the condemnation of our statute law.

Finally our conclusion may be stated as follows: If the contract be within the charter powers, expressly or by reasonable implication granted to the corporation, then those powers and franchises are in a large measure designed to be exercised for the public good, and this exercise of them is the consideration of the public grant (*Thomas v. West Jersey R. Co., supra*), and may be regulated and controlled by the State. If, on the other

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hand, the contract be not within the franchise and powers granted by the State in express terms, or by fair implication, then it is beyond the power conferred upon it by the legislature, and not voidable only, but wholly void, and is of no legal effect.

*Central Transp. Co. v. Pullman Co., supra.*

We are of opinion that the judgment of the Circuit Court should be affirmed.

*Affirmed.*

Statement.

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**Richmond,**

NORFOLK AND WESTERN RAILWAY CO. v. MUNDY.

November 18, 1909.

Absent, Buchanan, J.

1. TRIAL—*Construction of Writings*.—The construction of all written instruments adduced in evidence belongs exclusively to the court.
2. DAMAGES—*Covenant of Seisin*.—The measure of damages for the breach of a covenant of seisin, where nothing passes by the deed, is the consideration paid, with interest.
3. ESTOPPEL—*Decree Against Grantee—Notice to Grantor*.—Where the grantor and grantee in a deed of conveyance are impleaded in the same suit to require them to restore to the plaintiff water rights previously granted to him by said grantor and subsequently diverted by said grantee, and the suit is dismissed as to the grantor on his motion and against the protest of the plaintiff, the grantor is estopped to deny the binding effect of the decree made against his grantee.
4. ESTOPPEL—*Decree Against Covenantor—Notice to Covenantor—Res Judicata*.—It is a common practice to give notice to one bound by a covenant of title of the pendency of a suit involving such title, to appear and defend; and if upon such notice he fails or refuses to do so, he is as much bound by the judgment or decree in the case as if he had been formally impleaded.
5. PLEADING—*Pleas Amounting to General Issue—Refusal to Reject*. Pleas which amount to the general issue should, upon request, be rejected, though the failure to do so does not of itself constitute reversible error.

Error to a judgment of the Circuit Court of Botetourt county in an action of covenant. Judgment for the plaintiff for a small portion of its claim. Plaintiff assigns error.

*Reversed.*

The opinion states the case.

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*E. M. Pendleton, Marshall McCormick and Theodore W. Reath*, for the plaintiff in error.

*Benjamin Haden*, for the defendant in error.

WHITTLE, J., delivered the opinion of the court.

This action was brought by the Norfolk and Western Railway Company against the defendant in error, Mundy, to recover damages for a breach of covenant, involving the alleged false representation that the defendant was the owner of a certain water right in connection with a stream flowing through a race across plaintiff's right of way, which the company rested under contractual obligation to maintain; from which obligation the defendant, in consideration of \$500, undertook to release the plaintiff.

In the indenture of release the defendant granted to the plaintiff the right to fill in its trestle at the point in question, providing only one culvert for the passage of the waters of the stream. It transpired that prior to the execution of the deed of release the defendant had conveyed his interest in a foundry and machine shop lot, to which the water right was appurtenant, to the Riverside Land Company. After sundry intermediate alienations the property was purchased by Obenchain, who filed a bill in equity against the railway company and Mundy to require them to restore his water rights, the flow of the water having been diverted by filling in the company's trestle.

The circuit court granted the relief prayed for, and its decree was affirmed by this court on appeal. *Norfolk & Western Ry. Co. v. Obenchain*, 107 Va. 596, 59 S. E. 604.

It will thus be seen that Mundy's attempted release of the company from its obligation to maintain the water right was inoperative by reason of his having previously disposed of his interest in the subject matter.

To the present action the defendant pleaded the general issue

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and certain special pleas, and thereupon the jury returned a verdict for the plaintiff for \$77.41.

The ruling of the trial court in denying the motion of the plaintiff for a new trial, and in entering judgment upon the verdict constitutes the ground of this writ of error.

The court's refusal to strike out plea No. 2, in which the defendant seeks to set off the estimated value of a roadway under the trestle, which was destroyed by the fill, against the plaintiff's demand, and permitting the introduction of parol evidence in support of the plea, and refusing to give instruction "B" at the instance of the plaintiff, together constitute the *crux* of the case. It will be more satisfactory, therefore, to consider these assignments concurrently.

The instruction is as follows: "The court instructs the jury that the only thing conveyed by James Mundy to the Norfolk and Western Railway Co. by his deed filed with the plaintiff's declaration was the release of the obligation that said railway company was under not to interfere with the water right, at the water wheel at the machine shops, which it was bound to maintain under the deed from Echols to the S. V. R. R. Co.; and that the decree of this court entered June 25, 1906, in the case of *D. C. Obenchain v. N. & W. Ry. Co.* is conclusive evidence that at the time Mundy attempted to convey said right to the N. & W. Ry. Co. he did not own said water right, but had conveyed it to the Riverside Land Co. on the 1st of October, 1890, and, therefore, the N. & W. Ry. Co. acquired nothing by Mundy's deed to it, and such being the case, the plaintiff is entitled to recover the full amount it paid Mundy for said release—i. e., \$500.00, with interest thereon from the 30th of April, 1901."

The general rule is well settled that the construction of all written instruments adduced in evidence belongs exclusively to the court. *Washington, &c., R. Co. v. Lacey*, 94 Va. 460, 26 S. E. 834; *New River Min. Co. v. Painter*, 100 Va. 507, 42 S. E. 300.

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It is also a well settled rule that the measure of damages for the breach of a covenant of seisin, where nothing passes by the deed, is the consideration paid, with interest. *Building, L. & W. Co. v. Fray*, 96 Va. 565, 32 S. E. 58.

We are moreover of opinion that Mundy was bound by the proceedings in the Obenchain suit. He was impleaded along with the Norfolk and Western Railway Company, and on his own motion, against the protest of his codefendant, the suit was dismissed as to him, on the ground that he was not a necessary party to the litigation. Without pausing to inquire into the correctness of that ruling, it is sufficient to say that the railway company insisted that he be retained as a party to aid in the defense of the suit, so that there might be a decree over against him in the event of an adverse decision. Under these circumstances Mundy is clearly estopped to deny the binding effect of the decree in that litigation.

It is common practice to give notice to one bound by a covenant of title of the pendency of a suit involving such title to appear and defend; and if upon such notice he fails or refuses to do so he is as much bound by the judgment or decree in the case as if he had been formally impleaded. *Rawle on Cov. of Title* (5th ed.), sec. 117, *et seq.*; *Morgan v. Haley*, 107 Va. 331, 58 S. E. 564.

Instruction "B" contains a correct statement of the principles of law sought to be inculcated, and was pertinent to the questions at issue, and ought to have been given. As a corollary to that proposition, plea No. 2 should have been rejected, and it was error to admit parol evidence to sustain its averments, and to vary, contradict or add to the plain and unambiguous terms of the deed of release.

The circuit court, in like manner, erred in overruling the plaintiff's motion to strike out special pleas No. 4 and No. 5. The averments of these pleas are equivalent to the general issue, and in such case the rule is to reject the special pleas, though the failure to do so does not of itself constitute reversible error.



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For the foregoing errors the judgment must be reversed, the verdict of the jury set aside, and the case remanded for a new trial to be had therein not in conflict with the views expressed in this opinion.

*Reversed.*

Syllabus.

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**Richmond.**

NORFOLK AND WESTERN RAILWAY CO. v. POTTER.

November 18, 1909.

Absent, Buchanan, J.

1. **APPEAL AND ERROR—Amount in Controversy—Disallowed Set-Off.**—A set-off is equivalent to an action, and where the amount of a set-off disallowed by the trial court exceeds three hundred dollars the amount in controversy is within the jurisdiction of this court.
2. **APPEAL AND ERROR—Objection for the First Time—Filing of Set-Off—Case Heard on Set-Off—Estoppel.**—A plaintiff will not be allowed to make the objection for the first time in this court that a set-off was not filed by the defendant in the trial court, where it appears that, although the set-off was not marked filed, and the record does not show the filing, the account of set-offs was in the record before the trial began, and the plaintiff had notice of it; that the defendant called attention to it, witnesses were examined with respect to it, the instructions dealt with the subject and were based upon it, and both parties, throughout the trial, treated it as a part of the record to be considered by the jury and the court.
3. **CARRIERS—Delay in Delivering Goods—Action for Price—Measure of Damages.**—In an action against a carrier to recover the sale price of goods which the plaintiff has had reshipped to him from a distant State over the lines of connecting carriers because the consignee refused to accept them, but the delivery of which has been delayed after arrival because of the inability of the carrier to get an account of back charges and storage from the connecting carriers, where there is no proof of any such appropriation of the goods as would charge the carrier with the original sale price thereof, and there is no claim in the pleadings or proof of any other loss or damage to the goods, the only damage, if any, which the plaintiff can recover is that resulting from a failure to deliver the goods after their return, and the measure of this damage is the difference between the

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market value of the goods at the time they should have been delivered to the plaintiff and the time the defendant did surrender the possession, or was ready and offered to surrender it.

Error to a judgment of the Circuit Court of Botetourt county in an action of *assumpsit*. Judgment for the plaintiff. Defendant assigns error.

*Reversed.*

The opinion states the case.

*E. M. Pendleton, Marshall McCormick and Theodore W. Reath*, for the plaintiff in error.

*Benjamin Haden*, for the defendant in error.

HARRISON, J., delivered the opinion of the court.

This action of *assumpsit* was instituted by T. H. Potter to recover of the Norfolk and Western Railway Company the value of one hundred and fifty cases of canned tomatoes, shipped by the plaintiff from Troutville, Va., to Cedar Town, Ga., and also twenty dollars for expenses incurred in four trips with his wagon and horses from his home in Botetourt county to Troutville, for the purpose of removing the tomatoes, which had been returned by order of the plaintiff from Cedar Town to Troutville. The aggregate claim of the plaintiff was \$282.50, and the claim for storage and freight charges asserted by the defendant was \$414.64. There was a verdict and judgment in favor of the plaintiff for \$156.81, and it is insisted that this court is without jurisdiction, because the amount involved is less than three hundred dollars.

The claim by way of set-off, which is equivalent to an action, is for more than \$300, and it is not denied that this determines the right of the defendant to this writ of error; but it is contended that the record does not show that the set-off was filed.

The record does not show that the clerk marked the set-off "filed," nor does it appear that there was an entry in the order

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book showing the filing. It does, however, abundantly appear that the account of set-offs was in the record before the trial began, and that the plaintiff had notice of it. The trial judge, in bill of exception No. 1, certifies as a fact "that the defendant in open court called attention to its account of set-offs, theretofore left with the clerk, with directions to file the same; that the paper was produced by the clerk and was treated by the court all during the trial as part of the record, although not actually marked filed." The record shows that the witnesses were examined with respect to the set-offs; the instructions deal with the subject and are based upon it, and it clearly appears that this claim of the defendant was, throughout the trial, treated by both parties as part of the record to be considered by the jury and determined by the judgment of the court. In the face of such evidence it cannot be successfully claimed that the case was not heard upon the set-offs, or that the account of set-offs was no part of the record. Under such circumstances the plaintiff is estopped and will not be permitted to make such an objection for the first time in this court. It would be to allow him to take advantage of his own wrong, for had he made the objection in the court below that the account of set-offs had not been formally filed the matter would have doubtless received prompt attention and correction. *Deatrick's Admr. v. State Life Ins. Co.*, 107 Va. 602, 59 S. E. 489.

The case shown by the record is that on the 29th and 31st days of May, 1907, the plaintiff delivered to the defendant company at Troutville, Va., one hundred and fifty cases of tomatoes, to be shipped to Cedar Town, Ga. The cases containing these tomatoes started from Troutville about June 1, 1907, and reached Cedar Town on June 26, 1907. The line of the Norfolk and Western Railway Company extended only from Troutville as far as Bristol, Virginia, at which point connection was made with the Southern Railway Company, which connected with the Central of Georgia; the latter being the last carrier of the tomatoes to their destination at Cedar Town. Messrs. Holla-

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way & Smith, the consignees, refused to accept the tomatoes because not in good condition.

Considerable correspondence ensued between the plaintiff, Potter, and the consignees, which resulted in a final rejection of the goods by Hollaway & Smith. This correspondence shows that there was no suggestion that the railroad companies were in any way responsible for the condition of the goods. The dispute was entirely as to the marketable condition of the goods when shipped by the plaintiff. As late as August 12, 1907, this controversy was still going on between the parties, on which day the plaintiff wrote Messrs. Hollaway & Smith the following letter:

“Dear Sir,—Yours rec’d. I see nothing to be gained by disputing over a matter in which both of us seem to be equally positive. In regard to the tomatoes being some swells which my customers had returned, would say I have never had one can returned yet, and I had three thousand cases in the same lot from which yours were taken, and only nineteen cans as yet have been reported swells and only two were shipped since yours, and every can has been paid for without quibble except yours. You say you would not ship ‘such stuff.’ What do you mean by ‘such stuff’? You say you bought ‘standard goods.’ Can you tell me what are standard goods? You have never said in what particular my goods are not ‘standard.’ They undoubtedly are ‘standard’ weight and are packed in ‘standard’ cans, and if the can contains anything except what the label denotes you may report me to the pure food commission and have the goods examined at my expense.

“I know the goods are all right except a very few swells and leaks, which I always agree to pay for. I told the broker when I sold the goods that they were a little rusty from being out the cases, as it was impossible for us to get cases last year during the canning season. He asked me if the tomatoes were all right. I said yes, and I stand by that statement. I have proposed to do as fair with you as I know how—that is, to pay you for every break and swell, and you positively decline to do this.

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“Now I am willing for the court of Georgia to pass on it, and if they say my goods are worthless, then I do not want anything for them; or if it is fair and honest for a firm to order goods, examine them without authority from anybody, hold them two months, then report them worthless after new goods are on the market, then I have no conception of fairness. I have ordered the broker to come to your town and look after it, and if you ordered the goods and are worth the money, you may depend upon paying for them; if not I will see by what authority the railroad company let you into my goods without first complying with the written instructions.”

Subsequently, on August 30, 1907, the plaintiff, Potter, requested the defendant company, in writing, at Troutville, to have the one hundred and fifty cases of tomatoes returned from Cedar Town to Troutville. This request was communicated through the proper channel to the agent of the Central of Georgia Railway at Cedar Town, and the goods were reshipped and arrived at Troutville on September 21, 1907. The car containing these goods on their return trip arrived at Troutville on what is called an “astray way bill,” which means, as explained in the record, that the goods were consigned to no one and not accompanied by way or other bill indicating what the back charges were. These back charges included storage of the goods at Cedar Town from June 26 to September 1, 1907, when the goods were, by order of the plaintiff, reshipped to Troutville, and freight charges due the several carriers engaged in their transportation. The Central of Georgia was the initial carrier in reshipping the tomatoes to Troutville, and it is obvious that it was not the fault of the defendant company that the goods arrived at Troutville on an “astray way bill” and without a revenue bill accompanying the car on its return trip showing the back charges.

Upon the arrival of the goods at Troutville the plaintiff was promptly notified of the fact, and the further fact that the agent at that place had received no information as to the amount of the back charges. It appears that the plaintiff came to Troutville

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on four different occasions with his teams, prepared to remove the goods, offering to pay a reasonable freight charge and to surrender the original bills of lading which had been issued to him when the tomatoes were shipped to Cedar Town, but did not remove them because the agent of the defendant company at Troutville could not, as stated by him, deliver the goods until the back charges were paid, and he had not been informed as to the amount of such charges.

On November 29, 1907, the plaintiff presented to the agent of the defendant company at Troutville his claim in writing for loss and damage. The claim presented, as well as the claim sued upon and filed as a bill of particulars with the declaration, was for the full original price which his Georgia consignees had agreed to pay the plaintiff, and expenses of four trips with his teams to remove the goods. This claim was based upon the theory that the defendant company, by withholding the delivery of the goods, upon their return to Troutville, for the reason stated, had appropriated or converted them to its own use, and had thereby become liable for the original agreed price between the plaintiff and his consignees, who had rejected the goods because they did not measure up to the representations that the plaintiff had made of them.

On December 31, 1907, the agent of the defendant company at Troutville notified the plaintiff, in writing, that he had received the revenue bill showing the back charges of freight, etc., and requesting him to call and pay these charges and remove his goods. This the plaintiff declined to do, and six months later institutes this action of *assumpsit*.

The declaration alleges that the defendant company had promised to pay the sum sued for, but had disregarded its said promise. The plaintiff himself testifies that neither the defendant company nor any of its agents or officials had ever promised him to pay for these goods, but that on the contrary they had disputed his right to charge them to the defendant.

The declaration proceeds alone upon the theory that the de-

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defendant company had appropriated and converted the tomatoes to its own use, by reason of its refusal, after they were returned to Troutville, to deliver them to the plaintiff on the four occasions mentioned; and had thereby become liable to the plaintiff for their value. There were averments, by way of recital, that there was an unreasonable delay in the shipment of the tomatoes from Troutville to Cedar Town, and on the trip from the latter place back to Troutville, but there is not one word of proof in the record to show that there was any such unreasonable delay. Nor is there any proof that there was any damage done to these goods, physically or otherwise, either in going from Troutville to Cedar Town, or in returning from the latter place to the former. There is no averment of damage, except in a vague and indefinite way, and that damage is only alleged to have been occasioned by delay in shipment, and is entirely without proof to sustain it. The bill of particulars follows the theory of the declaration and contains no reference to, or item of, damage or loss.

Under the pleadings and evidence in this case, there being no proof of any such appropriation of the tomatoes as would charge the defendant with the original sale price of the goods, the only damage for which it could be held responsible was the loss, if any, accruing to the plaintiff because of the delay in turning over to him the goods after their return to Troutville. This loss must be measured by the difference between the market value of the goods at the time the possession thereof should have been surrendered to the plaintiff and the time the defendant did surrender such possession, or was ready and offered to surrender such possession.

Under the pleadings and evidence in this case there were but two questions to be submitted to the jury: First, whether or not the defendant was responsible for the delay in delivering the goods to the plaintiff after their return to Troutville, and, if so, what damage, if any, that delay caused the plaintiff; and, second, the amount the defendant was entitled to recover by reason of its account of set-offs.



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It is unnecessary to review in detail the numerous instructions given in this case. It is sufficient to say that they do not properly submit the case to the jury. They are, in the main, not justified by the pleading, not based upon evidence, and relate to subjects wholly foreign to the questions at issue.

For these reasons the judgment complained of must be reversed, the verdict of the jury set aside, and the case remanded for a new trial not in conflict with the views expressed in this opinion.

*Reversed.*

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Syllabus.

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**Richmond.**

## PHOENIX INSURANCE CO. v. SHERMAN.

November 18, 1909.

Absent, Buchanan, J.

1. **FIRE INSURANCE—*Inventory—Lump Sums—Gross Items.***—An inventory is an itemized list or enumeration of property, article by article. A mere statement of articles, put down in lump sums, or entire bills put down at a gross sum, with no statement of the several articles named, or of the quality or cost price is not an inventory within the meaning of the "iron safe clause" of fire insurance policies.
2. **FIRE INSURANCE—*Iron Safe Clause—Object Of.***—The "iron safe clause" found in all policies of insurance on shifting stocks of merchandise requires the insured to take certain inventories and to keep certain books. There is nothing unreasonable in its requirements. Under it the insurer has the right to such a compliance with its terms as will fairly and intelligently inform him during the life of the policy as to the stock carried by the assured, and, in case of fire, as to the stock burned and the fair cash value thereof; and it is no hardship upon the assured to comply with this requirement of his policy.
3. **FIRE INSURANCE—*Iron Safe Clause—Character of Books Required.***  
A substantial compliance with the requirements of a fire insurance policy, including the "iron safe clause" is all that is necessary. Books need not show articles sold if they show the amounts for which they are sold, nor the prices if the articles are shown; nor is it necessary to show whether they were sold for cash or on credit. But if a large business is conducted, and sales made both for cash and on credit, and these are commingled, without any distinguishing mark or token, it is inconceivable that "a complete record of the business transacted" can be kept. The books should be such as will enable the insurer to ascertain with substantial certainty and definiteness the value of the goods destroyed by fire, otherwise they do not comply with the "iron safe clause."

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4. FIRE INSURANCE—*Iron Safe Clause—Inventory—Books—Case at Bar.*

If an inventory taken prior to the date of an insurance policy is relied upon as a compliance with the "iron safe clause," then the assured must also keep a set of books *from the date of the inventory*, and during the continuance of the policy, showing a complete record of the business transacted in order to comply with the terms of that clause. In the case at bar, the book offered in evidence does not comply with this requirement, and, in fact, is just such a book as might have been written up at one time after the fire.

Error to a judgment of the Circuit Court of Wise county in an action of *assumpsit*. Judgment for the plaintiff. Defendant assigns error.

*Reversed.*

The opinion states the case.

*Phlegar & Powell* and *Irvine & Morison*, for the plaintiff in error.

*Bullitt & Chalkley* and *W. S. Mathews*, for the defendant in error.

CARDWELL, J., delivered the opinion of the court.

The defendant in error brought this action in the Circuit Court of Wise county against plaintiff in error to recover the amount of an insurance policy upon a stock of general merchandise in his store.

Upon the trial of the cause, and after the evidence had all gone to the jury, the defendant demurred thereto, in which demurrer the plaintiff joined, and the court, after taking time to consider as to its judgment, overruled the demurrer to the evidence and entered judgment for the plaintiff for the full amount of the policy, \$2,000, ascertained as the damages by the verdict of the jury subject to the ruling of the court upon the demurrer to the evidence.

The policy in question was written and took effect May 12,

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1907, to expire on the 12th day of May, 1908, and the fire occurred December 24, 1907, resulting in a total loss of the goods covered by the policy.

The defenses to the action relied on were, first, those arising under the iron safe clause of the policy; and, second, fraud and false swearing touching the subject matters involved in the suit, which were set out in the written grounds of the defendant's defenses, but in so far as it was alleged that the plaintiff had been guilty of false swearing in regard to his losses, the removal of goods from the store prior to the fire, the entry on such books as he claimed to have kept of all goods removed from the store, and that the plaintiff caused or connived at the fire in question, the grounds of defense are waived in the argument in this court; so that the case turns upon whether or not the judgment of the circuit court upon the demurrer to the evidence should have been for the defendant, upon the grounds that the plaintiff had not taken, kept and produced the inventories of his stock of merchandise, nor the set of books, he was required to take, keep and produce by the iron safe clause of the policy sued on.

The iron safe clause is as follows:

(1) "The assured will take a complete itemized inventory of stock on hand at least once in each calendar year, and, unless such inventory has been taken within twelve calendar months prior to the date of this policy, one shall be taken in detail within thirty days after the issuance of this policy, or the policy shall be null and void from such date, and upon the demand of the assured the unearned premium from such date shall be returned.

(2) "The assured shall keep a set of books which shall clearly and plainly present a complete record of the business transacted, including all purchases, sales and shipments, both for cash and credit, from date of inventory, as provided for in the first section of this clause, and during the continuance of this policy.

(3) "The assured will keep such books and inventory, and also the last preceding inventory, if such has been taken, securely locked in a fireproof safe at night, and at all times when

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the building mentioned in this policy is not actually open for business; or failing in this, the assured will keep such books and inventories in some place not exposed to a fire which would destroy the aforesaid building.

“In the event of failure to produce such set of books and inventories for the inspection of this company, this policy shall become null and void, and such failure shall constitute a perpetual bar to any recovery thereon.”

The contention of the defendant is that the plaintiff is not entitled to recover on the policy for the reasons, first, that he failed to keep and produce certain inventories required by the policy, viz.: the inventories said to have been made by him in April and October, 1907; second, that the inventory dated January 1, 1907, was not such an inventory as he was required to take and produce, in that a number of the articles contained therein were put down in lump sums, or the entire bills listed, without being separated into their necessary component parts; and, third, that the so-called “cash book” produced by the plaintiff is insufficient in that it does not comply with the requirements of the iron safe clause of the policy.

It would be difficult to find a more unsatisfactory compliance with the iron safe clause of an insurance policy covering a stock of general merchandise than is offered in evidence in this case. The inventory produced and claimed to have been made January 1, 1907, months before the policy was issued, is a mere statement of articles put down in lump sums, or entire bills are put down at a gross sum, and no statement made as to the number of the several articles named, or their quality or cost price. To illustrate the character of this so-called inventory, we have only to mention a few of the various articles embraced therein, viz.: 1 case of jewelry, \$250; 1 bill of medicine, \$10; 1 bill of shoes, \$61.50; “to bill of hats,” \$22.50; “to bill of shoes,” \$67.40; “1 bill dishes,” \$45.84; “lamps,” \$6.30; glass assortment, \$9.50.

There is nothing unreasonable in the requirements of the

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“iron safe clause” found in every policy of insurance issued on a shifting stock of merchandise. Under that clause the insurer has a right to such a compliance with its terms as will inform him during the life of the policy, fairly and intelligently, as to the stock of merchandise carried by the insured, and, in case of loss by fire, as to the stock of merchandise burned and the fair cash value thereof; and it is no hardship upon the insured to comply with this requirement of his policy. Any other rule would open wide the doors for the perpetration of frauds and the grossest impositions upon insurers.

Lexicographers say that “an inventory is an itemized list of the various articles constituting a collection, estate, stock in trade, etc., with their values.”

In *Fire Asso. of Phil. v. Calhoun*, 28 Tex. Civ. App. 409, 67 S. W. 153, it is said: “The ordinary and accepted meaning of the word ‘inventory’ is an itemized list or enumeration of property, article by article. Where a fire policy provided that, unless a complete inventory of the stock covered had been made within twelve months prior to its issue, one should be taken within thirty days, or the policy would be void, and the only inventory taken included such articles as ‘hardware, \$25; Marble City Drug Co., \$53.66,’ etc., the policy was not complied with, such an enumeration of articles not constituting an inventory.” *Roberts, &c., v. Sun. Mut. Ins. Co.*, 19 Tex. Civ. App. 338, 48 S. W. Rep. 559; *So. Fire Ins. Co. v. Knight*, 111 Ga. 622, 36 S. E. 821, 78 Am. St. Rep. 216, 52 L. R. A. 73.

It is difficult to see how such an enumeration of articles, as was made by the plaintiffs in the cases just referred to and in this case, would operate to defeat the very purpose of the “iron safe clause” in the policy. Here the plaintiff has lumped about one-tenth of the so-called inventory said to have been made January 1, 1907, and if the case of jewelry, for instance, put down in lump at \$250, had been listed item by item, the defendant would have been fully informed as to what was contained in the

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case and been able to have shown, if such was the fact, that the value thereof was much less than the lump sum stated.

The default and neglect of the plaintiff in not complying with the "iron safe clause" of his policy is accentuated by the fact, admitted by him, that he undertook to make in April and October, 1907, detailed inventories of his stock of goods, which were never completed, and were not preserved, as would have been the case had he complied with the terms of his policy, but on the contrary they were left in the store unprotected and were burned. These inventories, according to his own admissions, were more nearly a compliance with his duty to the defendant and with the law than the one he relied on, claimed to have been made January 1, 1907. The default and negligence of the plaintiff going to defeat his right of recovery on the policy is all the more apparent from the evidence as to his non-compliance with the "iron safe clause" with respect to keeping a set of books, etc.

There is no way whatever by which the insurer can know to what extent a stock of merchandise has been depleted, if such be a fact, without a compliance on the part of the insured with the terms of the "iron safe clause" of his policy with respect to the set of books he agreed to keep.

It is very true that the court held in *Prudential Ins. Co. v. Alley*, 104 Va. 356, 51 S. E. 812, that it is not necessary that the books should show the *articles* sold, provided they show the *total amounts* for which they were sold; and in *N. B. & M. Ins. Co. v. Edmundson*, 104 Va. 486, 52 S. W. 350, that a substantial compliance with the requirements of a fire insurance policy, including the "iron safe clause," and the provisions as to proof of loss, is all that can be reasonably exacted; and that it is not necessary that the books should show the *prices* for which the goods were sold, provided they show the *articles* sold; nor is it necessary to show whether they were sold for cash or on credit; but neither of those cases apply to the facts in this case, which call for a more stringent application of the rule laid down in the first-named case than the facts

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proved therein called for. Alley's sales were all for cash; therefore his cash account, into which nothing went but proceeds of sales, without a list of sales, was evidence of what he was selling; and in the other case, Edmundson made but two sales after the inventory taken by him in accordance with the requirements of the policy. They were entered on the book containing the inventory, which was preserved and offered in evidence, and stated the articles sold, to whom, when and at what price.

In this case a large business was being conducted, and sales made daily for both cash and credit. Not a single item of cash sales was entered, but the proceeds of the credit sales were mingled with the proceeds of the cash sales, without any distinguishing mark or token, the amount of the cash sales being only ascertainable by the parol evidence of the plaintiff as to what went into his cash account. It is inconceivable that "a complete record of the business transacted" could be kept without distinguishing cash from credit, and making entries indicating what the cash received was for.

In *Everett-Ridley, &c., Co. v. Traders Ins. Co.*, 121 Ga. 228, 48 S. E. 918, 104 Am. St. Rep. 100, it is said: "The intention of this clause ('iron safe clause') of the contract is to enable the insurance company, by means of accurate records of the business of the insured, to ascertain with substantial certainty and definiteness the value of the stock of goods destroyed by fire. . . . A cash book which only shows the amount of cash taken in at the end of each day, giving no indication of the source from which the cash is derived, whether from cash sales, from the payment of past due bills, or what not, can in no sense be considered a complete record of business transacted, including all purchases, sales and shipments, both for cash and credit." See also *Pelican Ins. Co. v. Wilkinson*, 53 Ark. 353, 13 S. W. 1103; *Western Ins. Co. v. McGlothry*, 115 Ala. 213, 22 South. 104, 67 Am. St. Rep. 26.

It is argued, however, that the contract "did not require Sherman to keep any books whatever prior to May 1" (1907), but



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this contention falls when it is considered that the first paragraph of the "iron safe clause" in his policy gave him the choice to rely upon an inventory taken within twelve months prior to the date of the policy or to take one within thirty days thereafter; that the second paragraph of the clause bound him to keep a set of books from date of the inventory, as provided for in the first paragraph, and during the continuance of the policy. He relied, at the trial, upon the inventory claimed to have been taken January 1, 1907, more than four months prior to the issuance of the policy, and disregarded the provision of the contract requiring him to keep a set of books *from the date of the inventory* and during the continuance of the policy, showing a complete record of the business he transacted.

The evidence clearly shows that the plaintiff had an old ledger for the year 1906, which lapped over and carried a part of his credit sales and collections for January, 1907, which ledger was burned, and his cash book entries covered collections from the old ledger as well as from a new ledger put in evidence; but neither he (the plaintiff) nor his clerk could form an estimate of the amount of business done in the store after January 1, 1907; so that even if the plaintiff could have shown (as he could not) how many of the entries on his cash book were derived from collections taken from the ledger in evidence, he was unable to show the amounts taken from the ledger that had been burned.

To go over here the evidence in detail would serve no other purpose than uselessly to prolong this opinion. The plaintiff relied greatly upon his cash book, the entries upon which were usually made, as he stated, after his day's sales were over and he had counted his cash in hand, but from these entries and his attempted explanations thereof, it was a matter of impossibility to form an intelligent conclusion as to what business he had transacted or what stock of goods was in the store and destroyed by the fire. A majority of the entries on the ledger are without date, and the evidence leaves no room to doubt that the entries in

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the so-called cash book, writings and figures included, were all made with the same colored lead pencil, all written in the same handwriting and upon a clean and unsoiled book, showing that it was just such a book as might have been written up at one time and after the fire, and was not such a cash book as was required of the insured. The plaintiff was examined especially as to ninety-two of the credits on the ledger, made on thirty-six dates, from January 18 to December 1, 1907, aggregating \$556.81, and he stated facts by way of explanation as to only four of them, but those explanations were contradictory of his books.

Upon an examination of the whole evidence it is clear that the jury would not have been warranted in finding that there had been a substantial compliance on the part of the plaintiff with the terms of his policy, either with respect to the inventory of the stock of goods required or the set of books stipulated for, showing a complete record of the business transacted by him. Therefore we are of opinion that the judgment of the circuit court should be reversed, the demurrer to the evidence sustained, and judgment entered here in favor of the defendant.

*Reversed.*

Statement.

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**Richmond,**

PULASKI ANTHRACITE COAL CO. v. GIBBONEY SAND BAR CO.

November 18, 1909.

Absent, Buchanan, J.

1. APPEAL AND ERROR—*Conflicting Instructions—Harmless Error.*—The doctrine of harmless error is seldom, if ever, applied to conflicting instructions on a material point, as the court cannot tell whether the jury were guided by the correct or the incorrect instructions.
2. NEGLIGENCE—*Independent Acts of Several—Apportionment of Damages—Joint Tort Feasors.*—Where there is neither community of interest, concert of action, common purpose or design, nor joint, concurrent negligence, but several concurring negligent causes, the effects of which are separable, due to independent authors, neither being sufficient to produce the entire loss, each of the several parties concerned is liable only for the injuries due to his negligence; and the fact that it is difficult to measure accurately the damage caused by each contributor to the aggregate result does not affect the rule, or make any one liable for the acts of others. In such case there is no joint wrong, and hence there can be no joint action, nor in a single action can all the damage be assessed upon one tort feasor.
3. NUISANCE—*Independent Acts of Several—Several Liability—Mining Operations.*—If several mining companies, acting independently, cast their refuse into a stream thereby causing injury to a lower riparian owner, each is liable only for the damage done by its acts, and not for the result of the acts of others.

Error to a judgment of the Circuit Court of Pulaski county in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

*Reversed.*

The opinion states the case.

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*Phlegar & Powell* and *Longley & Jordan*, for the plaintiff in error.

*W. B. Kegley* and *John S. Draper*, for the defendant in error.

CARDWELL, J., delivered the opinion of the court.

The defendant in error brought this action against plaintiff in error, and recovered a verdict and judgment for \$1,000 damages, alleged to have been sustained by the plaintiff by reason of the deposit of slack, slate, culm and mine refuse in and along the banks of New river from the defendant's coal mine, which slack, etc., it is alleged, was carried down the river and thrown upon the sand bar of the plaintiff, situated on the east side of New river three and one-half miles below the mine of the defendant.

The declaration claimed that the plaintiff owned the said sand bar; that it contained a large quantity of valuable marketable sand and gravel; that prior to and until January 26, 1906, it was selling therefrom large quantities of the sand and gravel, for which it was deriving a certain profit per cubic yard; and that the defendant, owning and operating its coal mine some three and one-half miles above said sand bar, had placed, prior to January, 1906, a large quantity of slack, slate, culm and mine refuse in the river and along its bank, so that the same was carried down the river, some by the ordinary tides, and more by high water, and thrown upon said sand bar, and became mixed with the sand and gravel thereon, so as to render the sand worthless, etc.

At the trial of the cause, upon the issue joined on the plea of not guilty, it was developed that the land of which the sand bar was a part was conveyed to William Gibboney by a deed dated the 21st day of September, 1905, in consideration of \$4,000, which was furnished him by one Frank Bell and others, who afterwards formed the plaintiff company, incorporated; that William Gibboney at once began shipping sand in his own name,

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but at the expense and for the benefit of the plaintiff corporation, and continued to do so until January 27, 1906, when he conveyed the land, including the sand bar, to this corporation, chartered the 4th day of January, 1906; that after such conveyance the business of selling and shipping sand and gravel for commercial purposes was carried on in the corporation's name, William Gibboney being in charge, and all the accounts of the transactions theretofore had by William Gibboney acting for the prospective corporation, were carried over to the accounts of the latter; that in January, 1906, and repeatedly thereafter, there were floods in New river which covered the sand bar, and each flood left more coal and other injurious properties in the sand than had previously been there; that the conformation of the river bed was such as tended to carry heavy matter from the western to the eastern side of the river; that the defendant and its predecessor in title to the coal mines now owned by it had placed considerable quantities of culm, slack and mine refuse along and in the river, much of which had been carried away by high water; that coal mines have been operated for many years, one almost directly opposite defendant's mine and but a few hundred feet from the river bank, and many others on Tom's creek and Strouble's creek and their tributaries, on the east side of the river, and on Back creek on the west side of the river, all emptying into New river above defendant's mine; that the culm, slack and mine refuse from these mines was placed or washed into said streams and down them into New river; and that in 1904 the Virginia Anthracite Coal Co. took charge of some mines on Strouble's creek and had opened and continued the largest mining operations of the twenty-five in all, including the defendant's mine, in that section, and that much of its culm, slack and mine refuse had gone into the creek and been washed down into New river.

There were several exceptions to rulings at the trial on the introduction of evidence, but they are not relied on here, and only two questions are presented for decision, viz.: first, whether

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or not the plaintiff could recover in this action for damages done to the sand bar prior to the time it acquired the legal title thereto; and, second, whether, if the defendant's coal and other refuse from its mine and that of the other coal mines each contributed to the injury the plaintiff sues for, the defendant is liable only for such portion of the damage as its coal and other mine refuse did to the sand bar, or for all the damage done by the deposit in and upon the sand bar of coal and other refuse from all the mines which may have contributed to the injury.

With respect to the first question, we deem it only necessary to say that the evidence tended to prove that the damage to the sand bar prior to the acquisition of the legal title by the plaintiff was but a very small part of the injury complained of, and that whatever substantial injury the plaintiff sustained was done after it acquired the legal title to the said bar. Therefore the defendant was but slightly, if at all, prejudiced by the rulings of the court on the introduction of evidence as to damages to the sand bar prior to that date.

It is very clear that the trial court, in instructing the jury, proceeded upon the theory that the defendant was a joint tortfeasor with others who, as the evidence tended to show, contributed to the pollution and injury of the plaintiff's sand bar, and was responsible for the entire damage. Not only so, but contradictory instructions to the jury were given as to the defendant's liability to the plaintiff upon the facts which the evidence tended to establish, and which we have already stated.

Instruction No. 1, given for the plaintiff, told the jury that the defendant was liable for the whole damage done, if it "*materially contributed*" to the injury of the sand bar, although others also contributed; while, by plaintiff's instruction Nos. 4 and 5, the jury were told that the defendant was liable only for such proportion of the damage as was done by its refuse; and defendant's instruction No. 3, telling the jury that "the defendant is not liable for any damage which may have been done the plaintiff's sand bar from other mines than those ope-

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rated by it, and if the evidence shows that the sand bar was injured by matter from defendant's mines and other mines, the defendant is not liable for any more of the damage than the evidence shows was done by the matter from its mines," was refused.

The learned counsel for the plaintiff concede that plaintiff's instructions Nos. 4 and 5 are in conflict with its instruction No. 1, but it is insisted that instruction No. 1 is a correct instruction, and therefore the defendant could not have been and was not prejudiced by the contradiction in the instructions; this contention being based upon the theory that the record shows that if the jury were misled by the contradictory instructions they were misled to the prejudice of the plaintiff and not of the defendant, as evidenced by the amount of damages awarded the plaintiff.

In this view we cannot concur. The doctrine of harmless error is seldom, if ever, applied to conflicting instructions on a material point, for the all-sufficient reason that the court cannot say whether the jury were guided by the correct or the incorrect instructions. *Va. & N. C. W. Co. v. Chalkley*, 92 Va. 62, 34 S. E. 976; *N. & W. Ry. Co. v. Mann*, 99 Va. 180, 37 S. E. 849; *Richmond Pass. & Power Co. v. Steger*, 101 Va. 319, 43 S. E. 612; *Amer. Tobacco Co. v. Polisco*, 104 Va. 781, 52 S. E. 563; *Southern Ry. Co. v. Hansbrough*, 107 Va. 733, 60 S. E. 58; and *Norfolk Ry. & L. Co. v. Higgins*, 108 Va. 324, 61 S. E. 766.

Moreover, we are of opinion that plaintiff's instruction No. 1 is an incorrect statement of the law of this case. No one can be required to answer in damages for the wrong of another, with whom he was not in privity or concert, and whose action he could not control. This case comes within the purview of the line of authorities dealing with pollution of streams, the pollution causing damage to health or property, and though there is seeming lack of harmony in the authorities, the unmistakable weight thereof is that where there are several concurrent negligent causes, the effects of which are separable, due to

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independent authors, neither being sufficient to produce the entire loss, then each of the several parties concerned is liable only for the injuries due to his negligence.

These principles are stated and the distinctions drawn in 21 Am. & Eng. Ency. L., pp. 496-7, 719, citing a number of decided cases. On the last-named page, where the liability of a person contributing to a nuisance along with others is dealt with, it is said: "But if he acts independently, and not in concert with others, he is liable for damages which result from his own act only. And the fact that it is difficult to measure accurately the damage which was caused by the wrongful act of each contributor to the aggregate result does not affect the rule."

The doctrine is lucidly discussed in the well-considered case of *Swain v. Tenn. Copper Co.*, 111 Tenn. 430, 78 S. W. 93, and the authorities reviewed at length; the result being that the doctrine we are contending for is unqualifiedly sanctioned. Among the cases there cited is *Dyer v. Hutchins*, 87 Tenn. 198, 10 S. W. 194, where the plaintiff sued the several owners of a number of dogs which united in worrying and killing his sheep, to hold them liable for the damage done his property, but it was held that each defendant was liable only for the injury done by his dog, and that a joint action could not be maintained, although it was impossible to tell the damage done by any particular dog.

The rule of law is stated in Jaggard on Torts, p. 797, as follows: "But the liability of joint contributors is not necessarily that of joint tortfeasors. If persons who maintain a nuisance act independently, and not in concert with others, each is liable for damages which result from his individual conduct only. And the fact that it may be difficult to actually measure the damages caused by the wrongful act of each contributor to the aggregate result does not affect the rule, or make any one liable for the acts of others." See also Gould on Waters, sec. 222; 14 Ency. Pl. & Pr., 1108; *Chipman v. Palmer*, 77 N. Y., 52, 33 Am. Rep. 566; *Little Scuykill, &c., Co. v. Richards*,



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57 Pa., 142, 98 Am. Dec., 209; *Missouri v. Illinois*, 200 U. S., 496, 50 L. Ed. 572, 26 Sup. Ct. 268.

The case of *Little Schuylkill, &c., Co. v. Richards, supra*, is directly in point, being an action brought against one of the parties contributing to a nuisance in filling up a milldam, resulting from throwing coal dirt into the river above it, by a number of parties acting independently of each other, to hold one of them liable for the entire injury. Held, that the defendant was liable for damages which resulted from his individual conduct only; and in conclusion the opinion says that to maintain the contrary doctrine "would be simply to say, because the plaintiff fails to prove the injury one man does him, he may recover from that one all the injury that others do."

In *Swain v. Tenn. Copper Co., supra*, in speaking of the cases holding a contrary rule to that laid down in the principal case, the opinion says, "that there was in those cases either community of interest, concert of action, or common purpose or design, or joint, concurrent negligence, in some form, which made the defendants joint tort feorsors, and that where carefully examined they are not really in conflict with the doctrine here announced."

In the view that we take of this case it becomes unnecessary to discuss other questions presented.

The judgment of the circuit court must be reversed and annulled, and the cause remanded to that court for a new trial to be had in accordance with the views expressed in this opinion.

*Reversed.*

Statement.

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**Richmond,**

SCOTTISH UNION AND NATIONAL INSURANCE CO. AND OTHERS  
v. CITY OF WINCHESTER.

November 18, 1909.

Absent, Buchanan and Cardwell, JJ.

1. CONSTITUTIONAL LAW—*Taxation—License Tax—Percentage of Receipts—Insurance Companies.*—An act of Assembly which levies upon an insurance company a license tax for a definite sum and also a percentage on its gross receipts, is not forbidden by that clause of the State Constitution which authorizes the General Assembly to levy a license tax on any business which cannot be reached by the *ad valorem* system. The percentage tax is not a property tax, but a privilege tax. Such has been the uniform legislative construction of such taxation for more than half a century, and such has been the course of decision in this court imposing similar taxation in analogous cases.
2. CONSTITUTIONAL LAW—*Doubtful Validity—Practical Construction.* If a statute is of doubtful validity it will not be declared unconstitutional where it appears that, under the same or similar constitutional provisions, like powers have been conferred by similar statutes which have never been called in question by the courts, nor by two constitutional conventions which have since assembled, but have received the sanction of the legislature and the inferior courts of the State, and have been acquiesced in for over half a century by all the departments of the State government. The practical construction thus put upon such acts will be regarded as decisive of their validity.
3. CONSTITUTIONAL LAW—*License Taxes—Ad Valorem System.*—There is no substantial difference between the Constitutions of 1869 and 1902 in relation to the imposition of taxes on licenses on business which cannot be reached by the *ad valorem* system.

Appeal from a decree of the Circuit Court of Frederick county. Decree for defendant. Complainant appeals.

*Affirmed.*

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Opinion.

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The opinion states the case.

*Barton & Boyd*, for the appellant.

*R. Gray Williams*, for the appellee.

WHITTLE, J., delivered the opinion of the court.

This suit was brought to enjoin the city of Winchester from imposing a license tax on appellants for conducting the fire insurance business in that city, on the ground that the ordinance is repugnant to Art. XIII, sec. 170 of the State Constitution of 1902. This appeal was allowed from a decree dismissing the bill on demurrer.

The tax bill, Appendix to Va. Code, 1904, sec. 23, p. 2201, provides: "That the specific license tax upon every such company for the privilege of doing business in the State shall be two hundred dollars a year, and in addition thereto a sum equal to one and one-quarter *per centum* upon the gross amount of all assessments, premiums, dues and fees collected or received, or obligations taken therefor, derived from its business in this State. . . ."

It is conceded that the city may impose taxes upon all subjects taxed by the State, and consequently if the act of the legislature is constitutional, the ordinance in question which imposes upon such companies a license tax of fifty dollars and one and one-half *per centum* on gross receipts, is also valid.

Appellants' objection extends only to the specific feature of the tax which they denominate a "license tax," and not to the graduated portion, which it is insisted constitutes an *ad valorem* tax, and affords conclusive proof that the business can be reached by that system; and, if capable of being so reached, a license tax may not be constitutionally imposed.

If this question were *res integra*, we should have no difficulty in holding that the percentage clause is not a property tax, but a privilege tax. Such has been the uniform legislative

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construction with respect to this species of taxation for more than half a century. When the Constitution of 1869 was adopted the legislature was habitually imposing both a specific sum and a percentage tax upon receipts of insurance companies as a license tax for the privilege of doing business in the State. Originally that sort of taxation was confined to foreign insurance companies (Acts 1852-3, p. 21, sec. 5; Va. Code, 1860, p. 248, sec. 36), but afterwards it was extended to all insurance companies, foreign and domestic, and in that form has passed through various enactments down to the present time. Acts 1871-2, p. 484; Va. Code, 1873, p. 360, sec. 58; Acts 1874, p. 357.

The present Constitution was ordained and established in the light of this legislative construction, and the General Assembly embodied a similar provision in the first tax bill enacted thereunder. Tax Bill, 1902, *supra*.

In *Barbour v. Grimsley*, 107 Va. 814, 61 S. E. 1135, this court held that "If a statute . . . is of doubtful validity, it will not be declared unconstitutional where it appears that, under the same or similar constitutional provisions, like powers have been conferred by similar statutes which have never been called in question by the courts, nor by two constitutional conventions which have since assembled, but have received the sanction of the Legislature, and the inferior courts of the State, and have been acquiesced in for over half a century by all the departments of the State government. The practical construction thus put upon such acts will be regarded as decisive of their validity." *Brown v. Epps*, 91 Va. 726, 21 S. E. 119, 27 L. R. A. 676; *Smith v. Bryan*, 100 Va. 199, 40 S. E. 652; *Henrico County v. City of Richmond*, 106 Va. 282, 55 S. E. 683, 117 Am. St. Rep. 1001; *Tiller v. Excelsior Coal & Lumber Corp.*, *ante*, p. 151, 65 S. E. 507.

But in addition to this long continued legislative usage with respect to the imposition of a specific and graduated license tax on insurance companies, we have direct authority in support of

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the constitutionality of acts imposing similar taxation in analogous cases. *Newport News, &c., R. Co. v. Newport News*, 100 Va. 157, 40 S. E. 645; *Postal Tel. Cable Co. v. Norfolk*, 101 Va. 125, 43 S. E. 207; *City of Norfolk v. Griffith Powell Co.*, 102 Va. 115, 121, 45 S. E. 889; *Gordon v. Newport News*, 102 Va. 649, 47 S. E. 828; *N. & W. Ry. Co. v. Suffolk*, 103 Va. 498, 49 S. E. 658.

The attempt is made, however, to escape the controlling influence of these decisions by the contention that the Convention of 1902, by not incorporating in Art. XIII, sec. 170, the precise language of Art. X, sec. 4, the corresponding provision of the Constitution of 1869 manifested a purpose to change the pre-existing policy of the State in relation to the imposition of tax on licenses.

A comparison of the two provisions shows that the contention is wholly without merit. In substance and legal intendment there is no difference between the two clauses. Section 4, after empowering the General Assembly to levy a license tax on specified occupations, concludes, "and all other business which cannot be reached by the *ad valorem* system." While section 170, without specifically mentioning any business, declares that the General Assembly "may levy a license tax upon any business which cannot be reached by the *ad valorem* system."

It is inconceivable that the shadowy distinction between these sections could have been intended to operate so drastic a change in the long established fiscal policy of the State. On the contrary, if such had been the purpose of the convention, it cannot be doubted that such intention would have been made known in unmistakable language.

The decree of the circuit court is plainly right, and must be affirmed.

*Affirmed.*

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Statement.

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**Richmond,****SHIRKEY AND OTHERS v. KIRBY, TRUSTEE AND OTHERS.**

November 18, 1909.

Absent, Buchanan, J., and Keith, P.

1. **EQUITY—General Original Jurisdiction—Administration of Trusts—Security for Loans.**—On the application of a trustee, a court of equity has the power, independently of statute, to secure a loan for necessary repairs and payment of a collateral inheritance tax on the corpus of real estate held in trust as a home for the joint use and benefit, support and maintenance out of the proceeds, of a husband and wife and his infant children during the lives of the parents, with remainder in fee simple to the children. The court, however, is limited in its power to the extent of the trust subject, and as the trust terminates with the lives of the parents, and the remainder is given to the children in fee, it has no power to extend the lien to the remainder in the land after the expiration of the trust estate.
2. **EQUITY JURISDICTION—Trusts—Effect of Subsequent Statutes.**—Trusts are peculiarly within the original cognizance of courts of chancery, and subsequent enactments dealing with that subject are not to be construed as taking away their pre-existing jurisdiction, unless such intention plainly appears.
3. **TRUSTS—Powers of Trustee—Powers of Guardians—Testamentary Trusts.**—The rights and powers of an executor or trustee under a will who holds the title to the property are quite different from those of a guardian who has the mere custody and management of his ward's estate, and the principles applicable to the latter relation and the decisions in relation thereto are not controlling in cases arising out of testamentary trusts.

Appeal from a decree of the Circuit Court of Augusta county in a suit in chancery in which appellants filed a petition for a rehearing, which was refused.

*Reversed in part.*

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The opinion states the case.

*Timberlake & Nelson*, for the appellants.

*J. M. Perry*, for the appellee.

WHITTLE, J., delivered the opinion of the court.

The question submitted on this appeal involves the power of a court of equity, independently of statute, to secure a loan for necessary repairs and payment of a collateral inheritance tax on the corpus of real estate held in trust as a home for the joint use and benefit, support and maintenance out of the proceeds, of a husband and wife and his infant children during the lives of the parents, with remainder in fee simple to the children.

The precise terms of the trust created by the will of Davis A. Kayser, deceased, are as follows: "I give, devise and bequeath to my nephew, Joseph J. Shirkey, my farm of 252 acres in Augusta county, near Staunton, known as 'The Virginia Waukesia Springs,' of which land 146 acres lie on the east side of the county road, and 106 acres on the west side of said road . . . (and all the personalty thereon), in trust, for the benefit and use of his wife and children; and at the death of the said Joseph J. Shirkey and his wife the said land shall pass to his lawful children then living, in fee simple. My object in making this devise is that out of the proceeds of the said farm there shall be a decent and comfortable living and home for the said Shirkey, for his wife and for his children, jointly; that all profits from said farm shall be held for the use and benefit of his wife and children; and that a remainder in fee simple be vested in his lawful children upon the death of the said Shirkey and his wife."

On the death of the testator the trustee was confronted with these conditions: There was a lien upon the property in favor of the Commonwealth for a collateral inheritance tax of \$447.46. The personal property upon the farm was inconsiderable.

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erable in amount and indispensable to its use; and the residence a large brick building located on the 146 acre tract, was in such ruinous condition that it was unsafe and uninhabitable, and actually falling down. For the conservation of the estate, indeed to prevent a failure of the trust, immediate action by the trustee became imperative.

There were no available trust funds, and to meet the emergency the trustee, with his own means, made such repairs and improvements as were necessary to preserve the estate and afford the beneficiaries the proper use and enjoyment of the trust subject, and a decent and comfortable home, as contemplated by the testator. The trustee then brought this suit against the beneficiaries, invoking the aid of a court of equity for reimbursement; and to that end praying that the existence of his lien for advances might be established as a charge upon the land, and that he be authorized to borrow a sufficient sum to repay the amount advanced and discharge the lien of the State for taxes, and to secure the loan by deed of trust upon the farm.

The allegations of the bill were established, and the circuit court granted the relief prayed for. The requisite amount of money was borrowed from the appellee, O'Connell, and secured by a trust deed on the entire tract of land.

The debt being several years past due, O'Connell was proceeding to enforce his deed of trust against the smaller of the two parcels of land when the infants, by their next friend, filed a petition to rehear and set aside the former decree, on the ground that the terms of the statute for leasing and selling lands of persons under disabilities had not been complied with, and that the court was without jurisdiction. But upon a rehearing the court adhered to its former decision, and the petitioners appealed.

It is conceded that this is not a proceeding under Va. Code, 1904, ch. 117, sec. 2620, to borrow money to be used to erect buildings or other improvements on lands of persons under disabilities. The relief sought is addressed to the general juris-



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diction of the chancery court with respect to trusts and trustees, a jurisdiction coeval with the foundation of the Commonwealth, and the exercise of which constitutes a basic principle of our system of equity jurisprudence.

The exigency which called into operation this jurisdiction in the instant case is not overstated in the decree under review, where it is said: "That the object of the devise . . . was to furnish a decent and comfortable home for the devisees upon said land; that said repairs and improvements were not only necessary and essential in order that the buildings upon the said land might furnish the beneficiaries of the trust . . . a decent and comfortable home, as directed by the testator, but were in great part made in order to save, and did save, the residence thereon from entire ruin. . . ."

The general doctrine that trusts are peculiarly within the original cognizance of courts of chancery will not be denied; and it is a settled rule of interpretation of statutes that subsequent enactments dealing with the same subject are not to be construed as taking away the pre-existing jurisdiction of such courts, unless such intention plainly appears. *Wayland v. Tucker*, 4 Gratt, 267, 50 Am. Dec. 76; *Parramore v. Taylor*, 11 Gratt. 220; *Faulkner v. Davis*, 18 Gratt. 651, 98 Am. Dec. 698; *Owners of Wenona v. Bragdon*, 21 Gratt. 685; *Durrett v. Davis*, 24 Gratt. 302, 315; *Christian & Gunn v. Worsham*, 78 Va. 100.

In a note to *Johnson v. Leman* (131 Ill., 609), 19 Am. St. Rep. 71, Mr. Freeman states the general rule in regard to the rights and duties of trustees in this class of cases as follows: "In addition to what has already been incidentally said it may be stated as a well established doctrine, universally applied, that a trustee has a right to make advances or necessary repairs or improvements for the benefit of the trust estate, against which he has a lien for reimbursement for such advances, or costs and expenses, which he may enforce before he can be compelled to surrender the estate, unless prohibited either expressly

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or by necessary implication from incurring such expenses by the terms of the instrument creating the trust. . . Trustees invested with general powers of control and management are not bound to strict limitations. They are justified in making ordinary repairs and improvements, and insuring the property, and are allowed to hold the estate until reimbursed; nor does the right of reimbursement depend upon the knowledge or consent of the *cestui que trust*. . . .”

So in 2 Pom. Eq. Jur., sec. 1085, it is stated as the law, both in England and in this country, that a trustee will be allowed “all payments expressly authorized by the instrument of trust, all reasonable expenses in carrying out the directions of the trust, and in the absence of any such directions all expenses reasonably necessary for the security, protection and preservation of the trust property, or for the prevention of a failure of the trust. . . . Where a trustee properly advances money for any of the above mentioned objects, so that he is entitled to reimbursement, he also has a lien as security for the claim, either upon the corpus of the trust property or upon the income,” according as the advancement is for the benefit of the life tenant, or for both the life tenant and remainderman. Hill on Trustees, 647, and notes; 2 Perry Trusts, sec. 913, and notes.

We have no difficulty in reaching the conclusion that the circuit court, in the exercise of its general chancery jurisdiction, had cognizance of this suit, and power, to the extent of the trust subject, to grant the relief prayed for. But the redress afforded should have extended no further, and the decree, in so far as it undertakes to fix a lien for advances made by the trustee upon the remainder in the land after the expiration of the trust estate, was erroneous.

The distinction between the rights and powers of an executor or trustee under a will, and a guardian, is well understood, and is clearly drawn in *Lamar v. Micou*, 112 U. S., 452, 28 L. Ed. 751, 5 Sup. Ct. 221: “. . . In the one case the title of the property is in the executor or the trustee; in the other, the title

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of the property is in the ward, and the guardian has only the custody and management of it, with power to change its investment." 21 Cyc. 77, 78, and notes.

Hence the principles applicable to the two relations are essentially different, and the decisions of this court concerning the relations of guardian and ward, and the management and control by the guardian of the ward's property, are not controlling in cases arising out of testamentary trusts.

For these reasons the decree under review must be reversed and annulled, in so far as it is herein declared to be erroneous, and in other respects affirmed; and the case will be remanded to the circuit court for such further proceedings as may be necessary to subject the trust estate to rental during its continuance, or for such shorter period as may be necessary to discharge the O'Connell lien with interest and costs.

*Reversed in part.*

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Opinion.

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**Richmond.**

## TAYLOR v. HEDRICK AND OTHERS.

November 18, 1909.

Absent, Buchanan, J.

1. **RES JUDICATA**—*Dismissal For Variance Between Allegation and Proof*.—Where suit is brought to quiet the title to land alleged to have been acquired by adverse possession, and it is shown that the title was not so acquired, but, if acquired, it was by deed from certain of the defendants, and the suit is dismissed from the docket solely on that account, the effect of the order of dismissal is to leave the parties just where they were before the suit was brought, with all rights then enjoyed by either party with respect to the deed unaffected and unimpaired by the suit. It is not a determination of the rights of the parties to the deed, and does not bar the grantees in the deed from setting it up against their grantor in a suit brought by him for the partition of the property conveyed.

Appeal from a decree of the Circuit Court of Rockingham county. Decree for defendants. Complainant appeals.

*Affirmed.*

The opinion states the case.

*D. O. Dechert and Roller & Martz*, for the appellant.

*John E. Roller and Conrad & Conrad*, for the appellees.

HARRISON, J., delivered the opinion of the court.

This is a suit for partition of a small lot of land, situated in the village of Dayton, in Rockingham county, Va., brought by the appellant, James E. Taylor, in which he claimed to be a

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joint tenant with the defendants. It was established beyond controversy that the appellant had, long before the institution of his suit for partition, executed and delivered, so far as he was concerned, a deed divesting himself of all interest in the property sought to be partitioned, by conveying the same to the appellees, Mary F. and Bettie Dodson, and the circuit court so held and dismissed his bill. From that decree this appeal has been taken.

When the evidence, both oral and documentary, was adduced, which showed conclusively that appellant had divested himself of all interest in the property, objection was made to its introduction, on the ground that the matter of the title to the real estate involved was *res judicata* by reason of the proceedings in certain ended causes theretofore heard together in the Circuit Court of Rockingham county, the records of which were thereupon filed in this case to be used as evidence on behalf of the appellant, so far as applicable.

The appellant contends that the subject had been the matter of controversy in the previous litigation, or ought to have been brought forward for the settlement therein; hence it cannot now be heard as a defense to his claim; that the doctrine of *res judicata* should have been applied and the appellees not permitted to prove the execution and delivery by him of a deed conveying his interest in the property to them. The refusal of the circuit court to apply this doctrine, under the facts of this case, is made the chief if not the only ground of error relied on in the petition for appeal.

This defense makes it necessary to inquire into the object of the ended causes relied on, and what was decided in them.

The land in question descended in 1873 to the heirs of Elizabeth Taylor. At the time of the death of Mrs. Taylor her son-in-law, John Dodson, with his family, were living on the property with her, claiming it as his own, and from that time to the present the Dodsons have lived on the property, claiming it as their own, paying the taxes and exercising, without interrup-

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tion, every right with respect thereto that an owner could exercise. The first of the ended causes, relied on as showing an adjudication of the right of appellant to an interest in this property, was brought by George W. Hedrick to enforce specific performance of a contract by which it was alleged that the Misses Dodson had sold him a small part of the land in controversy, and asking, in addition, for the removal of a cloud on the title to the property he had bought. To this bill all the heirs of Elizabeth Taylor, including the appellant, were made parties defendant. Soon after the last-named suit was brought, the appellees, Mary F. Dodson and Bettie Dodson, filed an original bill, with the same parties defendant, asking that the title to the whole property in controversy be quieted, and set up the same ground therefor that was asserted in the bill filed by George W. Hedrick. In each of these bills the sole ground upon which the court is asked to quiet the title to this property, as against the other heirs of Elizabeth Taylor, is that John Dodson and those claiming under him had been in the actual adverse possession of the property for a period more than sufficient to ripen their title into a good title against all the world, and especially against the heirs of Elizabeth Taylor, deceased. The deed by which the appellant had divested himself of all interest in the property was mentioned in both bills by way of recital, but in neither was it made a ground for the relief asked.

These two causes were heard together, and when the evidence was taken to establish the title of the Misses Dodson by reason of their adverse possession, the fact was developed that the appellant and other heirs of Elizabeth Taylor had executed and delivered a deed conveying their interest in the property to the Misses Dodson. Upon the hearing of the causes, on the 2d day of February, 1906 (Judge Letcher presiding), a decree was entered, holding that adverse possession had not been established, for the reason assigned that joint tenants could not hold adversely to each other, but that by virtue of the deed shown to have been executed and delivered, the parties had divested them-

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selves of all interest in the property in favor of the appellees. The court thereupon proceeded to decree further, quieting the title of the complainants in both suits.

In July, 1906, Judge Haas having succeeded Judge Letcher, the appellant, James E. Taylor, filed a bill to review the decree of February 2, 1906, which had been entered by Judge Letcher. In this bill of review he alleges that the sole issue before the court in the two causes mentioned was whether or not the complainants had established a title to the property by adverse possession, and that having held that there was no adverse possession it was error to go on and decree the title of complainants to be valid by reason of the deed executed and delivered by the appellant and other heirs of Elizabeth Taylor, when there was no allegation or pretense in the bills that the parties claimed title to the property by reason of such deed; and the prayer of the bill of review was, that a decree be entered confirming the title to the property in the heirs of Elizabeth Taylor, deceased, in accordance with the court's opinion upon the sole question in issue therein, etc.

Answers were filed to this bill by the appellees, and upon the hearing the court overruled the demurrers to the bill of review, set aside and annulled the decree of February 2, 1906, refused to allow the appellees to amend their respective original bills so as to put in issue the deed executed by the appellant and other heirs of Elizabeth Taylor, deceased, and struck both causes from the docket as ended; thereby holding, at the instance of and in favor of appellant, as shown by the decree and the opinion of the court filed therewith, that the validity of the deed, or the rights of the parties thereunder, was not an issue, and could not be brought forward as an issue under the pleadings in those causes, which were instituted, as alleged by appellant, for the sole purpose of having the title of appellees quieted upon the ground of their adverse possession; and that issue being against the appellees, there was nothing to do but to dismiss the two original bills from the docket.

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So far as appellant was concerned or interested, the former decree was set aside only so far as it affected his interest in the land. The decree does not declare any title to be in appellant, nor does it in any way pass upon or question the deed which is now relied on by appellees as their defense to the claim asserted by appellant in his suit brought for partition or sale of the land and distribution of the proceeds between himself and the other heirs of Elizabeth Taylor, deceased. The effect of the final decree, on the bill of review, was to leave the parties exactly where they were before the suits for quieting the title to the land on the ground of adverse possession were brought, with all rights then enjoyed by either party with respect to the deed in question unaffected or unimpaired by the proceedings then brought to a close by that decree. The correctness of the judicial determination by the court, that the deed was not an issue in the two causes then being heard together, and could not be brought forward as an issue under the pleadings in those causes, was not questioned, but was acquiesced in by all parties.

It follows from what has been said that the decree of October 13, 1906, which was obtained by the appellant, furnishes no ground for the claim now made by him, that the matter of the title to the real estate in controversy was *res judicata* by reason of the proceedings in the two ended causes mentioned; or that said decree constitutes a bar to the right of appellees to rely upon their deed from him as a defense to his suit for a partition of their land, in which he is shown to have divested himself of all interest.

The petition for appeal alleges that the deed was not produced, no pleading filed alleging its loss, and no evidence introduced to obtain its production, or proof of its loss.

The appellant admits that he executed and delivered the deed to an agent of the appellees, who was aiding the Misses Dodson in securing a release by the heirs of Elizabeth Taylor of their outstanding title to the property. The record shows that the deed was called for, and further shows that proof was adduced,



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of the person in whose possession it was left, that it was lost or destroyed. The proof is so full and convincing that the deed conveying his interest in the property to the appellees was executed and delivered by the appellant that it is unnecessary to further consider or discuss that subject.

There is no error in the decree appealed from, and it must be affirmed.

*Affirmed.*

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**Richmond.**

## VALZ v. COINER AND OTHERS.

November 18, 1909.

Absent, Buchanan, J.

1. **EQUITY—Bill of Review—Errors Reviewable.**—The errors on the record for which a bill of review will lie must be errors of law apparent upon the face of the record. They must be such as appear on the face of the decrees, orders and proceedings in the cause, arising on facts either admitted by the pleadings, or stated as facts in the decrees. The evidence outside of the decree cannot be examined to determine whether the court erred in its judgment in the determination of the facts. This is the proper office of the court upon an appeal, but not upon a bill of review.

Appeal from a decree of the Circuit Court of Augusta county, rendered on a bill of review filed by the appellant. Decree for defendants. Complainant appeals.

*Affirmed.*

The opinion states the case.

*J. M. Perry*, for the appellant.

*Charles & Duncan Curry* and *Braxton & McCoy*, for the appellees.

CARDWELL, J., delivered the opinion of the court.

This is an appeal from a decree of the Circuit Court of Augusta county, dismissing on demurrer a bill of review filed by the appellant to review and reverse for errors of law appearing upon the face of the record a decree made July 3, 1907, in the cause of *Coiner v. Higginbotham*.

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The original bill was filed by P. M. Coiner against C. D. Higginbotham to enforce a vendor's lien retained by Coiner in a deed which had been executed by him to Higginbotham some years before, and the land involved in the suit was a lot in the city of Staunton, on the eastern side of South Augusta street, south of its intersection with New Courthouse street. In the course of the suit various proceedings were had, Higginbotham setting up a number of defenses, among which was a failure in the quantity of land purported to be conveyed to Higginbotham by Coiner, arising from the fact that the rear portion of the lot was claimed by A. M. Valz, the appellant here.

The cause was twice referred to a master commissioner, and was finally heard and determined—certainly as to appellant—by the decree of July 3, 1907, asked to be reviewed, in which decree it was held that the parcel of land in dispute passed to and became the property of Higginbotham under the deed of conveyance from P. M. Coiner, and was not the property of the appellant, Valz, and adjudicated costs against Valz. The decree of July 3 brought the cause on to be heard on the papers formerly read, the report of the master commissioner, with exceptions thereto, the depositions of witnesses, deeds and other documents and plats returned by the commissioner with his report or referred to by him and offered by counsel, and then states the deeds of conveyance referred to. Then follows the adjudication above stated, and the residue of the decree merely carries out the findings and conclusions of the court.

That this was a final decree as to appellant, Valz, is not questioned. There is no reference to facts admitted by the pleadings or stated as facts in the decree, and the bill of review seeks to have the decree reviewed for errors apparent upon the face of the record, but in fact seeks to have the entire case reviewed upon not only the pleadings but the evidence introduced into the record for and against the complainant in the bill of review; and the decree from which this appeal was allowed merely sustains the demurrer to the bill of review and dismisses the bill.

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The petition for the appeal seeking to have the decree dismissing the bill of review reversed enters into a consideration of the entire record in the case—the pleadings, the proofs, and the decrees entered in the cause. It seems to have been overlooked that on a bill of review the proofs cannot be considered, and that if the decree sought to be reviewed is contrary to the proofs, remedy can only be sought by appeal. The decision of the court upon the issues of fact, so far as they depend upon the proofs, is conclusive on a bill of review. *Rawlings v. Rawlings*, 75 Va. 76. The sole contention in the bill of review was that the decision of the court was contrary to the facts upon which the decree was founded.

In *Rawlings v. Rawlings*, *supra*, the case of *Bartlett & Miller v. Fifield*, 45 N. H. 81, is cited with approval, and in that case it is said that “where a cause is heard upon bill, answer, and proofs, a bill of review cannot be maintained upon the ground that the proofs fail to establish the facts upon which the decree is founded.”

In *Rawlings v. Rawlings*, *supra*, as in this case, the errors the bill of review sought to correct were not errors of law apparent in the decree, but errors in judgment in the determination of the facts on which the decree complained of was based, and the opinion in that case says that: “We are not allowed to look into this evidence, on a bill of review, to determine whether the deductions of fact were erroneous or not. That, as has been seen, would be the proper office of the court on an appeal.”

So, in this case, the decree of July 3, 1907, has nothing upon its face upon which we could determine whether the adjudication therein was erroneous or not.

As was said by Christian, J., in *Thomson v. Brooke*, 76 Va., at p. 163: “It is well settled that a bill of review can only be brought upon two grounds—first, upon newly-discovered evidence; and, second, upon errors of law apparent upon the face of the record.” And, quoting from the opinion in *Rawlings v. Rawlings*, *supra*, as follows: “As to errors of law, they must be such as appear on the face of the decrees, orders and proceed-

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ings in the cause, arising on facts either admitted by the pleadings or stated as facts in the decrees. Such errors of law, and such only, may be corrected by a bill of review. But if the errors complained of be errors of judgment in the determination of facts, these can only be corrected by appeal." And quoting from *Dexter v. Arnold*, 5 Mason's Rep. 303, it is said, that "in regard to errors of law apparent on the face of the decree, the established doctrine is that you cannot look into the evidence in the case in order to show the decree to be erroneous in its statement of facts. That is the proper office of the court upon an appeal. But taking the facts to be as they are stated to be on the face of the decree, you must show that the court has erred in point of law. If, therefore, the decree does not contain a statement of the material facts on which the decree proceeds, it is plain that there can be no relief by a bill of review, but only by an appeal to some superior tribunal."

In *Kern v. Wyatt*, 89 Va. 885, 17 S. E. 549, it was held that "error in deciding the ownership of attached property is one of fact, and can be corrected only by appeal, and not by bill of review." See also *Sharp v. Shenandoah Furnace Co.*, 100 Va. 27, 40 S. E. 103.

As remarked, the decree asked to be reviewed makes no statement of the facts nor refers to any agreed statement of facts upon which the court's decision adverse to appellant, A. M. Valz, was grounded, and, therefore, the case comes directly under the control of the authorities we have cited; and whether or not there was error in that decree cannot be determined upon a bill of review, since this court cannot look to the facts upon which the decree was rested, and cannot, therefore, say whether the decree was correct or incorrect. The presumption in such a case is that the decision of the trial court was correct.

For the foregoing reasons we are of opinion that the decree appealed from, dismissing appellant's bill of review on demurrer, is without error, and must be affirmed.

*Affirmed.*

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Syllabus.

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**Richmond,**

## VIRGINIAN RAILWAY CO. v. JEFFRIES' ADMINISTRATOR.

November 18, 1909.

Absent, Buchanan, J.

1. **INSTRUCTIONS—*Jury Sufficiently Instructed.***—It is not error to refuse to give further instructions to a jury who have already been fully and fairly instructed.
2. **NUISANCE—*Recurrent Injuries—Case at Bar.***—If an embankment of a railroad built partially into the bed of a river injures a sand bank on the opposite shore only at times of high water, then the erection of the embankment is not the direct cause of the injury, and no action lies in favor of the owner of the sand bank until some actual injury is suffered by him in consequence of the action of the water in the river.
3. **NUISANCE—*Continuous and Permanent Injuries—Recurrent Injuries.*** Where the damages resulting from an act lawful in itself are of such a nature that they are continuous and permanent, then all the damages from such nuisance must be recovered at one time and in one action, but when they are of such nature that it cannot be told whether or not they will continue, or what damage will result in the future, though the act which causes the damage is continuing and permanent, successive actions must be brought for the subsequent damage.
4. **NUISANCE—*Right of Action—Purchaser in Possession—Acts of Wrongdoer—Possession as Title.***—A purchaser of land in possession may maintain an action to recover damages for a nuisance committed thereon although his contract of purchase is not enforceable in a court of equity. Such infirmity cannot be taken advantage of by a wrongdoer who was not a party to the contract nor concerned in its validity. Furthermore, possession alone is sufficient title in such case to maintain the action.
5. **WITNESSES—*Refreshing Memory—Unenforceable Contract—Best Evidence of Date.***—Where it is material to show the date of the sale and delivery of possession of real estate in an action by the purchaser against a wrongdoer, the contract of sale, though unenforceable in equity, is admissible in evidence as a memorandum to refresh the memory of the vendor who is ex-

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amined as a witness on behalf of such purchaser, and also as the best evidence of such date.

6. TRESPASS—*Right of Action—Equitable Owner in Possession.*—The owner of an equitable estate who is in possession may recover for damages to realty, and a judgment against such party in possession is *res judicata* as against the holder of the legal title.
7. TRESPASS—*Right of Action—Unenforceable Contract Executed.* Where a contract for the sale of land which did not comply with the statute of frauds has been subsequently executed, a purchaser in possession at and after the date of the contract, may recover for the damages done to the land from and after such date.
8. STATUTE OF FRAUDS—*Consideration.*—The statute of frauds of this State does not require that the consideration for a contract for sale of real estate shall be stated in the writing, but expressly provides that it may be proved by evidence *aliunde*.
9. EXCESSIVE VERDICTS—*Case at Bar.*—The evidence in the case at bar is not such as would warrant the court in setting aside the verdict as excessive.

Error to a judgment of the Circuit Court of the city of Roanoke in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

*Affirmed.*

The opinion states the case.

*Robertson, Hall, Woods & Jackson*, for the plaintiff in error.

*Poindexter & Hopwood* and *A. P. Staples, Jr.*, for the defendant in error.

CARDWELL, J., delivered the opinion of the court.

On January 1, 1906, and for some time theretofore, G. J. Persinger was the owner of a certain sand bank on the southern side of the Roanoke river, in Roanoke county, near what was known as the "Buzzard's Rock Ford," about one mile southeast of Roanoke city, and about the date named he leased the sand bank for a period of one year at a rental of \$120 to one C. W. Hancock, who after operating the bank for about six months

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sold his lease at a profit of about \$40 to one E. F. Jeffries. Jeffries was at that time the owner of a nearby plant for the manufacture of cement blocks, or artificial cement stone, and, finding the sand obtained from this bank of a very fine quality and valuable for use in this business, on May 31, 1906, he bought the sand bank from Persinger, at a cost of \$1,200, for which sale there was a written memorandum signed by Persinger, which is made a part of this record; and subsequently Jeffries also bought from Persinger another strip of land adjacent to the sand bank and to be used in connection therewith, at an additional cost of \$200. These two pieces of property were conveyed by Persinger to Jeffries by deed duly executed and delivered January 2, 1907, and Jeffries continued to operate the sand bank until the time of his death, and after his death the same was operated for only a short while by members of his family.

In the construction of its railroad along the north bank of Roanoke river, in Roanoke county, at the point known as "Buzard's Rock Ford," the Virginian Railway Company found it necessary to extend a fill or embankment partially into the channel of Roanoke river, the channel being forced to the south. This construction work was commenced about February 1, 1906, the contract being let to D. A. Langhorne & Company, Inc., which company sublet a portion of the work, including that portion at or near "Buzzard's Rock Ford," to Bowman & Jamison, and the latter entirely completed their contract on September 15, 1906. It seems, however, that the portion of the fill or embankment which extends into the natural channel of Roanoke river was completed to within one and one-half feet of the grade of the railroad in April, 1906, and the grade of the railroad is located about four feet above the ordinary high water mark. At this point there is a sharp bend in the river, and in high water sand is deposited on the south bank, and for many years Persinger had been using this portion of his land by making sale of the sand deposited thereon for commercial purposes,



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and leasing the same, as above stated, to one Hancock, who assigned his lease to Jeffries.

Jeffries having died, E. W. Poindexter qualified as his administrator, and instituted this suit against the Virginian Railway Company and D. A. Langhorne & Company, Inc., to recover damages for the alleged destruction of the said sand bank by reason of the construction of the fill or embankment before mentioned so as to change the natural channel of Roanoke river; and upon the trial of the cause there was a verdict in favor of the plaintiff against the Virginian Railway Company for \$1,000, which the circuit court refused to set aside, and entered judgment thereon, to which this writ of error was awarded.

Omitting the formal parts of the declaration filed by the defendant in error, the first count alleges that plaintiff in error constructed its embankment partially across and into the natural channel of Roanoke river; that the waters of the river were, by means thereof, diverted over and upon the land owned by plaintiff's intestate, to the complete and utter destruction thereof as a sand bank for commercial and all other purposes. The second count alleges that by reason of the diversion of the waters in Roanoke river the natural and usual deposit of sand therefrom was interrupted, disturbed and terminated, to the complete and utter destruction of the property as a sand bank or a depository for sand, and for any and all purposes whatsoever.

The first assignment of error relied on for a reversal of the judgment is the refusal of the trial court to instruct the jury that if the injury complained of was of a permanent nature and was committed before the defendant in error's intestate acquired the property in question, the plaintiff could not recover in this action.

The contention of plaintiff in error is that, if the injury complained of in this case is of a permanent and continuing nature for which the whole damages should be recovered in one action, the owner of the land at the time the injury was committed should have sued for the damages sustained.

The second assignment of error, which may be considered

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along with the first, is rested upon the contention that if the injury complained of was not of a permanent character—that is, was not an original damage—the court erred in instructing the jury that the plaintiff could recover the amount that the fair cash value of the sand bank had been diminished by reason of the diversion of the waters of Roanoke river; in other words, the contention of plaintiff in error is, that in instructing the jury the court adopted inconsistent theories.

There can be no question that if the building of the embankment was the immediate cause of the injury to the owner of the sand bank on the opposite side of the stream, the cause of action arose in his favor; in other words, if the damage arose by reason of the construction of the embankment in Roanoke river, and was of a continuing nature, the cause of action arose to the owner of the sand bank thereby injured, and a recovery of damages could only be had by him.

Plaintiff in error sought to have the jury instructed as follows:

1. “The court instructs the jury that the burden is on the plaintiff in this case to establish by a preponderance of the evidence that the land mentioned in the declaration has been actually damaged, the extent of such damages, and that he has a right to recover the damages proved against the defendants or one of them. In order to render a verdict for the plaintiff in this case for any amount the jury must be satisfied from a preponderance of the testimony that the land mentioned in the declaration has been rendered less valuable by the alleged change in the channel of Roanoke river, and that the change in the channel of said river, which has resulted in the injury to said land, was made by the defendants while the plaintiff’s intestate was the owner of said land.

2. “The court instructs the jury that if they believe from the evidence that the fill or embankment constructed by the defendant is a permanent structure, and that the said fill or embankment is constructed partially across and into the natural channel of Roanoke river so as to change the natural channel of said

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river and divert the waters of said river across, over and upon the land in the declaration mentioned, and that the said fill or embankment was so constructed before the plaintiff's intestate became the owner of the said land, then the plaintiff cannot recover in this action, and they must find for the defendant."

The real purpose of these instructions, which were refused, was to submit to the jury the question, who was the owner of the sand bank at the time that the damages alleged to have been sustained by it actually occurred?

We are of opinion that the court did not err in refusing plaintiff in error's instructions 1 and 2, for the reason that the case, upon the evidence which had been introduced, was fairly covered by the instructions which the court gave.

The instructions given told the jury, first, that if they believed from the evidence that the defendant railway company constructed its embankment into the natural channel of Roanoke river, and that if such construction diverted the waters of the river from their natural channel on and upon the sand bank belonging to the plaintiff's intestate, E. F. Jeffries, they should find for the plaintiff and against the railway company, and assess the damages at such sum as they might believe from the evidence that the fair cash value of the sand bank had been diminished by reason of the diversion of the waters, caused by the erection of the embankment in Roanoke river; second, that if the jury believed from the evidence that the value of the sand bank in question had been diminished by reason of the diversion of the waters of Roanoke river by the embankment, they should, in arriving at the plaintiffs' damages, take into consideration the value of the sand bank for supplying sand for commercial purposes, and in this connection should consider any decrease, either in quantity or quality, of the sand available for commercial purposes which the jury might believe from the evidence had been caused by the diversion of the waters by the embankment; and, third, that the burden was on the plaintiff in the cause to establish by a preponderance of evidence that

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the land mentioned in the declaration had been actually damaged, the extent of such damages, and that he had a right to recover the damages proved against the defendants, or any one of them.

The evidence tended to prove, beyond question, that the building of the embankment complained of was the cause of the diversion of the waters of Roanoke river from their original flow over and against the sand bank which is alleged to have been injured, and that no injury to the sand bank had been sustained merely from the construction of the embankment, but occurred subsequent thereto by reason of floods in the river. Therefore the case comes completely under the ruling of this court in the case of *Southside Railroad Co. v. Daniels*, 20 Gratt., 344, cited with approval in *Virginia Hot Springs Company v. McCray*, 106 Va. 461, 56 S. E. 216, 10 L. R. A. (N. S.) 465.

No injury having occurred to the sand bank directly from the erection of the embankment by the railway company, which was a lawful act, no suit could have been maintained until some actual injury was caused to the plaintiff's intestate by the action of the water in the river.

In the case of *Southside Railroad Company v. Daniels, supra*, it was held, in conformity to the great weight of authority, that where the damages resulting from an act lawful in itself are of such a nature that they are continuous and permanent, then all the damages from such nuisance must be recovered at one time and in one action, but when the damages are of such a nature that it cannot be foretold whether or not such damages will continue or what damage will result in the future, though the act which causes the damage is continuing and permanent, successive actions must be brought to recover for the subsequent damage. In other words, in cases where the act itself is lawful, whether or not the injury is original and permanent is to be determined from the nature of the damage; and this being the case the cause of action accrues at the time the first damage is sustained; for as the nature of the damage determines the char-

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acter of action to be brought to recover therefor, there can be no right of action until there is damage, and the defendant becomes liable for damages resulting from an act lawfully done from the date the first damage is sustained, whether the damage be permanent or temporary in its nature.

It was not seriously contested in this case that the sand bank in question was damaged—in fact, practically destroyed—as the result of the diversion of the waters of Roanoke river over and upon the sand bank in cases of high water or flood in the river, and the question seriously contested was: Who was the owner of the sand bank at the time the first injury thereto was sustained? And that question was fairly submitted to the jury in that part of the court's instructions which told them that the burden was on the plaintiff to establish by a preponderance of the evidence that the land mentioned in the declaration (that is, the sand bank) had been actually damaged, the extent of such damage, and that the plaintiff had a right to recover the damages proved against the defendants—that is, the jury were told that they must be satisfied by a preponderance of the evidence that the plaintiff's intestate, E. F. Jeffries, was the owner of the sand bank at the time the injury thereto was sustained.

There can be no doubt that the evidence tended to prove that whatever change there was in the channel of the river took place as soon as the embankment was built by the railway company, and that so far as it interfered with the natural channel of the river the embankment was completed prior to May 31, 1906; and that at that time the plaintiff's intestate was in the possession of and operating the sand bank for the use of the sand by himself or sale to others for commercial purposes.

But it is earnestly contended on behalf of the railway company that the plaintiff's intestate was not such owner of the sand bank as entitled him to recover damages for injury thereto until the execution and delivery to him of the deed of conveyance of January 2, 1907; and that the injury complained of having occurred prior to that time, he cannot maintain this action.

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This presents for consideration the third assignment of error, to the ruling of the trial court in admitting in evidence the contract of May 31, 1906, and in refusing to instruct the jury that this contract did not authorize the recovery of damages for injuries committed subsequent to the execution of the contract.

We are of opinion that there is no merit in this assignment of error. The ground of objection to the introduction of this contract was, that it was not such a contract as a court of equity would enforce, for the reason that it was not a valid and binding contract on anyone; but it seems clear from the authorities that if it were not a contract enforceable in a court of equity as being binding upon the parties thereto, such infirmity cannot be taken advantage of by a wrongdoer who was not a party to the contract or concerned in its validity or non-validity. If for no other reason the contract of May 31, 1906, was admissible in evidence as a memorandum to refresh the memory of the witness Persinger as to the date the plaintiff's intestate, Jeffries, took possession of the sand bank under the contract of purchase. 1 Greenleaf on Ev. (16th ed.), sec. 439-c. The time of this sale was a fact sought to be established at the trial, and the witness had stated that he could not remember the date exactly, but the written contract would show it, and for that purpose the contract was produced and offered in evidence, and as the best evidence of the date of the sale and delivery of possession of the sand bank by Persinger to the plaintiff's intestate, and it served also to show the character of the possession.

In *Wilson v. Phoenix Powder Mfg. Co.*, 40 W. Va. 413, 21 S. E., 1035, 52 Am. St. Rep. 890, the action was to recover for injuries done to realty by an explosion of powder stored in a neighboring building, and the question raised was the right of the plaintiff to maintain the action: Held, that as against a wrongdoer possession alone was sufficient evidence of title to maintain the action, the court saying: The plaintiff "could maintain his action, as he was in actual possession, which is one of the first elements of title, as it is *prima facie* evidence of full legal title

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in him who has it." See also 1 Lomax Dig., 574; 2 Min. Inst. 447; 2 Bl. Com. 596.

In a still later case, decided by the Supreme Court of West Virginia, *Clay v. City of St. Albans*, 43 W. Va., 539, 27 S. E., 368, 64 Am. St. Rep. 883, the plaintiff sued for damages done to his real estate from surface water diverted on his lands by the defendant, and the question of the right of the plaintiff to bring the action having been raised, the court held that possession alone was sufficient to maintain the action, and that his averment of possession in the declaration was good on demurrer. Steph. Pl. 287; 1 Perry on Trusts, sec. 328; *McKinzie v. Railroad Company*, 27 W. Va. 306, sustain the proposition that the owner of an equitable estate who is in possession may recover for damages to the realty, and that a judgment against such party in possession is *res judicata* as against the holder of the legal title. See also *Curtis v. Hoyt*, 19 Conn. 154, 48 Am. Dec. 149; *Carney v. Reed*, 11 Ind., 417.

In the case here the evidence showed that Persinger, the party to be charged by the contract of May 31, 1906, recognized the validity of the same and executed his deed in pursuance thereof; and as held by this court in *Wheeling Ins. Co. v. Morison*, 11 Leigh, 378, 36 Am. Dec. 385, a parol contract is not void by the statute of frauds, though its obligation may be repelled by the party sought to be bound by it. "The protection is introduced for his benefit by the statute, and may, of course, be renounced by him. If he is willing to abide by it; if disdaining the *mala fides* of breaking his plighted faith, merely because the ceremonies of the law have been neglected, he recognizes the contract and confesses its obligation, shall it not be enforced? Let the unvarying course of equity cases answer the question. How, then, can it be objected by a third person, that the contract which the party himself acknowledges and claims to be valid and binding upon him, is not to be so considered?" See *Burruss v. Hines*, 94 Va. 413, 26 S. E. 875.

*McMullin's Admr. v. Saunders*, 79 Va., 362, is conclusive au-



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thority for the proposition that when Persinger delivered to Jeffries the deed of conveyance for the property mentioned in the contract of May 31, 1906, in pursuance of that contract, the statute of frauds would have no effect upon the validity of the contract. Said the court in the case cited: "Even as to those executory contracts which are within the statute, it is now well settled that when they have been fully executed the statute has no power over them and no effect upon the rights, duties and obligations of the parties."

The contract here in question having been executed, the right existed in the plaintiff's intestate, Jeffries, from and after May 31, 1906, to maintain this action, and as to when the damage to the sand bank was sustained was a question for the jury upon all the evidence in the case.

The further contention made on behalf of the railway company that the contract of May 31, 1906, was not enforceable because it fails to state the consideration and terms of payment, and because the contract does not show that the parties had agreed upon the terms of payment, is without merit. In the first place section 2840 of the Code expressly provides that the writing need not set forth the consideration, but that this may be proved by evidence *aliunde*; and, secondly, Persinger testified on behalf of the plaintiff that he entered into the contract with Jeffries, and stated the consideration therefor, viz., \$1,200 for the sand bank, and \$200 for a parcel of land adjacent thereto, which consideration he had received, and further stated that the embankment was constructed by the railway company after he sold the sand bank to Jeffries, and the witness was not even cross-examined as to this statement. Furthermore, an endorsement on the contract made by Persinger showed that the parties had agreed on the terms of payment, and that the cash payment was to be made on January 1, 1907, and bonds for the residue were to be executed at that time.

It appears also from the record that it is immaterial whether the contract of May 31, 1906, was binding upon the parties, as it



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does not appear that any damage was done to the sand bank, or that any cause of action arose in that regard, prior to the execution of the deed by Persinger to Jeffries on January 2, 1907.

The fourth and last assignment of error is that the court erred in refusing to set aside the verdict, because the damages awarded were excessive; and we are of opinion that this assignment is also without merit.

Persinger testified in effect that the sand bank, prior to the injury complained of by the plaintiff, as resulting from the embankment built in the river, was worth \$2,400 or \$2,500, and that at the time of the trial it was worth less than one-half of what it was before; that he foresaw that the sand bank would be injured by the building of the embankment, and served notice on the company that he would hold it liable for damages incurred by reason thereof, and soon afterwards he sold the bank to Jeffries for about one-half of its value; that at the time he sold to Jeffries the sand bank was bringing a rental of \$120 a year, which is 6 *per cent.* interest on \$2,000; that the sand bank had yielded from \$8 to \$15 a month for the last three years he (Persinger) owned it; and that the supply of sand there was practically inexhaustible. It is further shown in the evidence that Jeffries considered the rental value even greater than \$120 per year, as he bought six months of Hancock's lease at \$100, or at the rate of \$200 a year, which was an indication that the sand was worth even more than the valuation put upon it by Persinger. It is further shown that at the time of the trial of the case more than one-half of the sand bank had been submerged or washed away, and that the quality of the sand left was so poor and contained so much gravel that it was practically valueless for commercial purposes, and that since the death of plaintiff's intestate, which occurred six months prior to the trial, the proceeds of the sale of sand from the bank had not been as much as \$10. It was further contended on behalf of the railway company that the backwater from the dam constructed several miles below on the Roanoke river was also one of the causes of injury to the sand bank; but as two of its own witnesses testified that

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the backwater benefited rather than injured the sand bank, the jury were warranted in the conclusion that the injury resulted in consequence of the erection of the embankment in the river.

It further appears that the jury viewed the premises in question in the presence of the judge of the court and counsel, and further that the additional strip of land bought at the price of \$200 to be used in connection with this sand bank, has, by reason of the destruction of the sand bank, been rendered practically valueless to the estate of plaintiff's intestate.

In view of these facts we would not be warranted in holding that the damages assessed by the jury are excessive.

For the foregoing reasons the judgment of the circuit court must be affirmed.

*Affirmed.*

Statement.

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**Richmond.**

VIRGINIA PORTLAND CEMENT CO. v. SEAL.

November 18, 1909.

Absent, Keith, P., and Buchanan, J.

1. MASTER AND SERVANT—*Safe Place—Comparative Safety—Evidence.*  
It is the duty of a master to furnish his servant a reasonably safe place in which to work, not an absolutely safe place, nor the safer or safest place. It is not for the jury to compare places and determine which was the safer, but to determine whether the place furnished was reasonably safe. Nor is evidence admissible upon the relative safety of different places.
2. MASTER AND SERVANT—*Safe Place—Promise to Change Place—Safety of New Place.*—If the master has promised his servant to change his place of work to a designated place evidence is admissible to show that that place is a safe place, but if it develops later that the master positively refused to make the change then evidence as to the safety of the new place is irrelevant.
3. MASTER AND SERVANT—*Servant's Choice of Methods—Duty to Select Safe Method—Custom.*—Where there is a safe and an unsafe way of doing a piece of work, both of which are open and obvious, and it is the duty of the servant to select the method, he should select the safe method, and the fact that he has theretofore, without the knowledge of the master, used the unsafe method will not relieve him of the charge of negligence if injured while pursuing that method. Custom or usage does not excuse negligence, nor relieve a servant from the duty of exercising reasonable care.

Error to a judgment of the Circuit Court of Augusta county in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

*Reversed.*

The opinion states the case.

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*A. C. Gordon and Jos. A. Glasgow*, for the plaintiff in error.

*Charles & Duncan Curry and Timberlake & Nelson*, for the defendant in error.

HARRISON, J., delivered the opinion of the court.

This action was brought by the plaintiff, L. H. Seal, to recover damages for a personal injury alleged to have been caused by the negligence of the defendant company. There was a verdict and judgment in favor of the plaintiff, which is brought under review by this writ of error.

The defendant company was engaged in the manufacture of cement. For the purpose of obtaining stone to be used in making the cement, the company operated several quarries. At one of these quarries the plaintiff was employed as "cut foreman," and had working under him some fifteen men. When the rock was thrown down from the bluff above, along the face of the quarry, it had to be broken up so that it could be loaded on the cars and moved to the plant. This was accomplished by the use of "doby blasts." These blasts were connected with a lead wire which was connected with an electric battery, and by plunging the battery the blasts were fired and the rock broken. The point designated by the defendant company from which the blasts were fired was a large tree measuring twelve feet one inch in circumference and three feet ten inches in diameter. This tree was situated something over three hundred feet from the middle of the quarry. The lead wire, which was used to fire the blasts, ran back to the tree as a firing point, and the plaintiff stood behind the tree for protection when firing the dobies. A number of these doby blasts could be connected with the lead wire and fired at the same time by one plunge of the battery, which was stationed behind the tree.

At the time of the accident in question the plaintiff had, with the aid of the men working under him, made a large number of these dobies, and was standing behind the tree operating the

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electric battery. When the blasts went off he was struck by a rock on the left arm, causing the injury complained of.

The contention of the plaintiff was that the duty of the defendant company required it to furnish him with a reasonably safe place to work, and that behind the tree designated by the company for that purpose was not a reasonably safe place from which to fire the blasts.

The contention of the defendant company was that behind the tree was a reasonably safe place to fire from, when the work was properly done; that the plaintiff was the author of his own injury by firing so many blasts at once, thus creating an enfilading fire from both ends of the quarry at the same time; and that the plaintiff was fully aware of the danger of firing from both ends of the quarry at the same time, it being open and obvious to anyone.

The first assignment of error is to the action of the court in allowing the plaintiff's witness, J. L. Deering, over the objection of the defendant, to testify that a certain power-house, mentioned in the record, was a reasonably safe place from which to fire doby blasts; and in allowing the witness, William Calvin, to testify that the power-house was a safer place to fire doby blasts from than the tree to which the lead wire ran.

This evidence was clearly inadmissible. The question for the jury was, whether the place furnished by the company for firing doby blasts was a reasonably safe place or not. There was no obligation upon the defendant to furnish an absolutely safe place, nor did it have to furnish the safer or the safest place. Its obligation was discharged when, in the exercise of ordinary care, it furnished a reasonably safe place. It was not for the jury to compare places and determine which was the safer, but to determine whether the place furnished was reasonably safe. *Bertha Zinc Co. v. Martin*, 93 Va. 791, 22 S. E. 869, 70 L. R. A. 999; *Richmond Locomotive Works v. Ford*, 94 Va. 627, 27 S. E. 509.

It is contended on behalf of the plaintiff that this evidence

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was admissible because Hunter, the general foreman, had promised the plaintiff to remove the firing point to the power-house.

This contention cannot be sustained. The statement of the plaintiff with respect to this matter was that he had complained to Hunter, the foreman, three times; that the first time he said the tree was a safe place; the second time he promised to remove the firing point; and the third and last time he refused to remove the firing point, saying that "it was all right." So that at the time the accident happened there was no promise to change the firing point, but, on the contrary, an emphatic refusal to do so.

It is further insisted that if this evidence was inadmissible the defendant has waived the error by allowing the plaintiff, without objection, to testify that the power-house was a safe place.

This contention is equally untenable. The record shows that when the plaintiff stated that the power-house was a safe place he had immediately before stated, as alleged in his declaration, that Hunter, the foreman, had promised him to move the firing point to the power-house. As the matter then stood, the statement rested upon a promise to move the firing point to the power-house. But when the plaintiff afterwards stated that the company had finally refused to change the firing point, it made the inquiry, whether any other was a safe place, irrelevant; and objection was made, stating at length the grounds relied on as showing this whole line of evidence to be improper.

The action of the court in modifying instruction No. 9, asked for by the defendant, is assigned as error.

This instruction is as follows: "The court instructs the jury that if they believe from the evidence that it was the duty of the plaintiff to fix the location and length of the line of the series of dobies to be fired at the base of the quarry, and if they believe from the evidence that, in the reasonable operation of said quarry, the length of said line of the series of dobies to be fired could be fixed at such a length as to make the tree a safe place

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to fire them from, and that the said line of the series of dobies could have been located in such a length as to make the tree an unsafe place to fire them from, then it was the duty of the plaintiff to adopt the safe method and to fix the length of the said line of the series of dobies of such a length as to render the tree a safe place; and if the jury believe from the evidence that plaintiff failed to adopt the safe method, and that his failure so to do contributed to his injury, then the jury must find for the defendant."

This instruction was modified by striking out the word "reasonable" and substituting in its place the word "usual," making the sentence read, "and if they believe from the evidence that in the *usual* operation of said quarry," instead of "in the *reasonable* operation of said quarry."

The modification of this instruction was error. The plaintiff, at the time of the accident, was, as cut foreman, in charge of the operation of the quarry and especially of the firing of the dobies. The evidence clearly tended to show that there was a safe way and an unsafe way of firing the dobies; that the plaintiff had, at the time of the accident, put down an unusual number of blasts, running entirely around the face of the quarry, which was concave in shape; that the danger arose from firing these blasts around the whole face of the quarry at the same time, thus creating an enfilading fire from the right and left of the tree at one and the same time; that the safe way to fire the dobies from behind the tree was to fire them in sections, and not all at the same time; and that the company did not know that the unsafe way was being pursued.

The instruction as modified was well calculated to confuse and mislead the jury. They were practically told that, although there was a reasonably safe way of firing the doby blasts, the plaintiff could adopt the dangerous method if that was his usual or customary way of operating; that the plaintiff could establish a custom of doing the work in a dangerous way, and then say, when charged with not using reasonable care for

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his own protection, that it was his usual way of doing the work. Custom or usage does not excuse negligence, and could not relieve the plaintiff from the duty of exercising reasonable care. *Simmons & Winch v. McConnell*, 86 Va. 494, 10 S. E. 838, 21 Am. and Eng. Enc. L. 524, and cases cited.

As the case must be remanded for the errors already pointed out, it would not be proper to comment on the evidence; nor is it necessary to consider other questions presented in the record that may not arise on another trial.

For these reasons the judgment complained of must be reversed, the verdict of the jury set aside, and the case remanded for a new trial.

*Reversed.*



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Syllabus.

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**Richmond.**

## WHITE'S ADMINISTRATOR v. PALMER AND OTHERS.

November 18, 1909.

Absent, Buchanan and Cardwell, JJ.

1. REVIVAL OF DECREES—*Scire Facias at Law*.—A decree is the result of a suit in chancery, and is placed by statute on the same footing with a judgment. A *scire facias* to revive it is strictly a legal process, and, if regular in other respects, is not invalidated because sued out on the law side of the court instead of the chancery side.
2. JUDGMENTS—*Revival—Scire Facias—Irregularity—Collateral Attack*.—An irregular or erroneous *scire facias* to revive a judgment is voidable only, and if the irregularity is not taken advantage of in some appropriate method, the judgment of revivor is valid. It cannot be collaterally assailed, and will support title derived from an execution issued by its authority.
3. JUDGMENTS—*Revival—Scire Facias*.—The proceeding by *scire facias* in this State is not a new suit, but a continuation of the old suit. Its object is to obtain execution of a judgment which has become dormant by the lapse of time, and it is essential that the writ, which serves the double purpose of a writ and a declaration, shall state all the facts necessary to authorize the relief sought. It should follow the judgment to be revived as to the amount, date, and parties.
4. JUDGMENTS—*Revival—Jurisdiction on Scire Facias—Matters Outside Jurisdiction—Collateral Attack—Liens*.—The extent of the jurisdiction of the court upon a proper writ of *scire facias* to revive a judgment is to render judgment that the plaintiffs in the writ may have execution of the judgment set forth in the writ. All beyond this is outside of the jurisdiction of the court and a mere nullity, and it may be so treated by any court in any proceeding, direct or collateral. If the judgment on the *scire facias* goes further and besides awarding execution on the original judgment awards the payment of money, the latter is void for want of jurisdiction and may be assailed collaterally. A judg-

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ment of revival merely is not a lien on land, though the judgment revived will constitute such lien.

5. JUDGMENTS—*Revival—Scire Facias—Must Recite Judgment.*—The sole order which can be properly entered upon a *scire facias* to revive a judgment is that the plaintiff may have execution upon the judgment. The writ is the only pleading in the proceeding and must recite the judgment to be revived. A *scire facias* upon a *scire facias* which neither recites nor makes any reference to the judgment to be revived is not sufficient to revive the judgment. It fails to aver facts essential to the jurisdiction of the court, and the judgment of revival is a mere nullity which may be treated as if it never existed.

Appeal from a decree of the Corporation Court of the city of Bristol. Decree for the defendants. Complainant appeals.

*Affirmed.*

The opinion states the case.

*Honaker & Campbell and Jos. L. Kelly*, for appellant.

*Page & Fulkerson, White & Penn, John W. Neal and J. Irby Hurt*, for the appellees.

KEITH, P., delivered the opinion of the court.

On the 27th day of July, 1882, the Supreme Court of Appeals of Virginia rendered a decree in favor of Newton K. White against Stuart, Buchanan & Company, which firm was composed of W. A. Stuart, Ben K. Buchanan, George W. Palmer and Joseph Jacques, for the sum of \$9,393.62, with interest on a part thereof from the first day of January, 1878, until paid; and at the first May rules, 1906, Milton White, Jr., as the administrator of Newton K. White, filed his bill in order to have satisfaction of this decree out of the property of those named as defendants therein and of certain other persons who had from time to time purchased real estate upon which it is claimed the aforesaid decree constituted a lien.

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The defendants appeared and pleaded the statute of limitations of five years, of ten years and of twenty years as a bar to the plaintiff's demand, and the Corporation Court of Bristol, to which the cause had been transferred, entered a decree sustaining the plea of the statute of limitations, without stating which statute it referred to, and dismissed the bill.

The decree sought to be enforced was, as we have seen, rendered on the 27th of July, 1882, and was docketed on the 27th day of October of that year. From an exhibit filed with the bill it appears that in February, 1891, a *scire facias* was sued out upon this decree, which was duly served upon the parties, and at a circuit court held for Washington county on the 4th of May, 1891, the following order was entered:

"*White v. Stuart and others.* On a *scire facias* to revive a judgment.

"The defendants being duly warned and not appearing, it is considered by the court that the plaintiff may have execution against the said defendants for the sum of \$9,393.62 with interest on \$5,297.60, part thereof, from the 1st day of January, 1878, till paid and his costs in this behalf expended."

It is objected to this execution that it issued from the law side of the circuit court upon a decree in chancery.

We do not think this objection well taken. The statute gives the same effect to a decree as to a judgment, and while the decree is the result of a suit in chancery, the *scire facias* to revive a judgment or decree is a strictly legal process, and if regular in other respects is not invalidated by reason of its having been brought on the law side of the court in order to have an award of execution upon a decree in chancery.

There seems to have been no execution issued upon this order awarding an execution.

In September, 1896, another *scire facias* was sued out, which recites the proceeding upon the *scire facias* at the May term, 1891, of the Circuit Court of Washington county, and sets forth that since the date of the order awarding execution on the judg-

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ment, Newton K. White, the plaintiff, William A. Stuart, and Joseph Jacques have departed this life, and Hartley G. White has duly qualified as executrix of Newton K. White, deceased, and at her instance a *scire facias* was sued out against the surviving defendants in the judgment. Process to answer this proceeding was duly served upon Palmer and Buchanan, and at a circuit court held on the 28th day of September, 1896, the following order was entered:

"Hartley G. White, Executrix of Newton K. White, deceased, v. George W. Palmer and Benjamin K. Buchanan, surviving partners of themselves and Joseph Jacques, deceased, and William A. Stuart, deceased, late partners under the firm name and style of Stuart, Buchanan & Co. On a *scire facias* to revive a judgment on a *scire facias*.

"This day came the plaintiff by her attorney, and it appearing to the court by the return of the sheriff that the defendants have been duly served with copies of the *scire facias*, and they not appearing, on motion of the plaintiff it is considered by the court that the judgment be revived, and that the plaintiff may have execution against the said defendants for the sum of \$9,393.62 with legal interest on \$5,297.60, a part thereof, from the 1st day of January, 1878, until paid, and \$8.40 the costs in the *scire facias* specified, and that the plaintiff recover against the said defendants her costs in this behalf expended."

This order or judgment was docketed November 2, 1896.

At a subsequent day the same parties were again summoned to appear at the courthouse of Washington county on the 11th day of July, 1898, to answer a *scire facias* for an award of execution, and on the 22d of September of that year the following order was entered:

"Milton White, Jr., administrator *de bonis non* with the will annexed, of Newton K. White, deceased, v. George W. Palmer and Benjamin K. Buchanan, surviving partners of themselves and Joseph Jacques, deceased, and William A.

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Stuart, deceased, late partners under the firm name and style of Stuart, Buchanan & Co.

“This day came the plaintiff by his attorney, and it appearing by the return of the sheriff of Smyth county and the return of the sheriff of Washington county that the defendants, George W. Palmer and Benjamin K. Buchanan, have been duly served with a copy of the *scire facias*, and they not appearing, on motion of the plaintiff it is considered by the court that the judgment be revived and that the plaintiff may have execution against the said defendants for the sum of \$9,393.62, with legal interest on \$5,297.60, part thereof, from the 1st day of January, 1878, until paid, and \$8.40 and \$7.01, the costs in the *scire facias* specified, and that the plaintiff also recover against the said defendants his costs in this behalf expended.”

There is the following endorsement upon this last judgment: “1898, Oct. 19th, *Fi. fa.* issued to 1st January Rules, to lie; 1899, January 9th, *Fi. fa.* issued to 1st April Rules—returned—held up by direction of the counsel. P. D. Clark, Deputy Sheriff for J. W. Hortenstine, S. W. C.”

Exhibit “E” with the bill is as follows: “Whereas Newton K. White has a judgment on the lien docket of Washington county, Virginia, which amounted on March 12, 1890, to \$9,505.51, and which amount bears interest from that date as per agreement in writing of Stuart, Buchanan & Co., with the said Newton K. White; and

“Whereas the balance due on said judgment as of February 12, 1897, is \$11,733.88; and

“Whereas William A. Stuart, now deceased, was a member of the firm of Stuart, Buchanan & Co., and was primarily liable as between the members of said firm of Stuart, Buchanan & Co., to pay one-half of said judgment; and

“Whereas the said estate of William A. Stuart has this day paid one-half of said amount, to-wit, \$5,866.94;

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"Now, in consideration of the aforesaid payment of the said one-half said judgment by the said W. A. Stuart's estate, as aforesaid, the undersigned surviving members of the said firm of Stuart, Buchanan & Co., do hereby authorize and empower Hartley G. White, Executrix of N. K. White, deceased, to mark satisfied the said judgment, so far, and only so far, as the estate of the said William A. Stuart is concerned; but that such release shall in nowise affect the lien of the residue of said judgment, to-wit: \$5,866.94, as of February 12, '97, against us, which amount is admitted to be the correct balance due by us as of said date, and that the same is to bear interest from that date.

"Witness our hands and seals, February 12, 1897.

"GEO. W. PALMER (Seal.)

"BEN K. BUCHANAN (Seal.)

"By Jean Buchanan."

The bill in this case was filed at the first May rules, 1906.

From the recital which we have made it appears that ten years did not elapse between the rendition of the decree of the Supreme Court of Appeals of July, 1882, and the suing out of the first *scire facias* at the May term, 1891. The same is true as to the interval between that order and the order upon the *scire facias* of September, 1896; and the last *scire facias* in the case was sued out at the September term, 1898.

The defendants were regularly summoned to answer each one of these proceedings, but they did not appear, and the question before us is how far these judgments are open to collateral attack.

In the note to *Frierson v. Harris's Heirs*, found in 94 Am. Dec. 245, it is said: "An irregular or erroneous *scire facias*, like an irregular or erroneous execution, is voidable, but not void. If the irregularity is not taken advantage of in some appropriate method, the judgment of revivor is valid. It cannot be collaterally assailed, and will support title derived from an execution issued by its authority."

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The proceeding by *scire facias* is with us not a new suit but a continuation of the old suit. Its object is to obtain execution of a judgment which has become dormant by the lapse of time, and it is essential that the writ, which serves the double purpose of a writ and a declaration, shall state all of the facts necessary to authorize the relief sought. It should follow the judgment to be revived as to the amount, date and parties. Freeman on Judgments, sec. 444.

The utmost extent of the jurisdiction of a court upon a writ of *scire facias*, reciting a judgment for money, and notifying the defendants to appear and show why the plaintiffs should not have an execution against them for the debt, interest and costs of said judgment, is to render judgment that the plaintiffs in the writ of *scire facias* have execution of the judgment in the writ set forth. Such judgment for award of execution does not constitute a lien on real estate; and a judgment on such a writ of *scire facias* (even where the writ is valid) for money, and not merely for award of execution, is in excess of the jurisdiction of the court and is absolutely void, and may be so declared either in a direct or a collateral proceeding. If upon a writ of *scire facias* the court gives judgment for money, and also awards execution, so much of the order as is within the jurisdiction of the court—that is to say, that the plaintiff have execution for the debt and costs of judgment—would be valid; but as a judgment for money it would be void. *Lavell v. McCurdy's Ex'ors*, 77 Va. 763.

Want of jurisdiction makes the judgment of a court a nullity, and it may be so treated by any court in any proceeding, direct or collateral; but the judgment may be valid to the extent of the jurisdiction, and invalid beyond. *Wade v. Hancock*, 76 Va., 620.

The writ of *scire facias* is the only pleading in the proceeding. Its office is to revive a judgment. It must recite a judgment; and the sole order which can properly be entered upon it is that the plaintiff have execution upon the judgment.

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Now in the writ issued in 1896 there is no reference whatever to the original judgment. It recites the proceedings upon a *scire facias* issued on the 4th of May, 1891, and the order of the court which awards execution upon it recites that it is upon "a *scire facias* to revive a judgment on a *scire facias*." The same is true of the *scire facias* sued out on the 11th day of July, 1898, upon which there was an award of execution on the 22nd day of September of that year. Both of them wholly fail to recite the judgment to be revived, or to make any reference whatever to it. There is, therefore, a total failure to aver facts essential to the jurisdiction of the court.

If the validity of the proceeding by *scire facias* issued on the 16th of February, 1891, and upon which there was an award of execution on the 4th day of May, 1891, be conceded, it does not prevent the bar of the statute, for with the orders of September, 1896, and September, 1898, out of the way, the original judgment was barred before the institution of this suit, which was on first May rules, 1906.

We are of opinion that there is no error in the decree of the circuit court, which is affirmed.

*Affirmed.*



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Statement.

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**Richmond.**

## WRIGHT v. CARSON AND OTHERS.

November 18, 1909.

Absent, Buchanan, J.

1. TAX SALES—*Deed From Clerk—Recitals as Evidence.*—The recitals in a deed from a clerk of a corporation court to a purchaser from the Commonwealth of land previously sold for delinquent taxes and purchased by the Commonwealth and by it subsequently sold to such purchaser are at least *prima facie* correct under the terms of the statute, and are to be accepted as true in the absence of any evidence to the contrary. There is no doubt as to the power of the legislature to make such recitals *prima facie* evidence.
2. TAX SALES—*Sale in County—Land Subsequently Taken Into City—Where Application to Purchase to be Filed.*—Where land lying in a county adjacent to a city is returned delinquent for taxes and is sold and purchased by the Commonwealth, and all the evidence of the various steps by which the title of the original owner was divested and placed in the Commonwealth is to be found in the clerk's office of the county court of the county, but subsequently the land is taken within the city limits pursuant to law, the application to purchase from the Commonwealth can only be made under the express terms of the statute, in the corporation court of the city wherein the land is situated, and not in the circuit court of the county wherein it was sold.
3. EVIDENCE—*Authenticity of Paper—Stipulation of Counsel—Case at Bar.*—The evidence in the case at bar sufficiently establishes the fact that a tax deed in the record which was objected to as not authentic, and as not evidence of the facts therein recited, was put in evidence on the trial under a stipulation of counsel that it might be introduced without preliminary proof that it was genuine and what it purported to be, and that what was referred to the court was its legal effect.

Error to a judgment of the Circuit Court of the city of Roanoke in an action of ejectment. Judgment for the plaintiffs. Defendant assigns error.

*Reversed.*

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**Opinion.**

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The opinion states the case.

*Hart & Hart*, for the plaintiff in error.

*Scott, Altizer & Watts*, for the defendants in error.

KEITH, P., delivered the opinion of the court.

This is an action of ejectment brought by Carson and Warwick against Wright, to recover a lot of land situated in the city of Roanoke.

The plaintiffs, to maintain the issue upon their part introduced a deed from the Janette Land Company to them of August, 1890. The defendant admitted that the land company traced its title back to the Commonwealth of Virginia, and was on the 25th of August, 1890, in possession of and owned said land in fee, and that on that day, by its deed, it conveyed the lot to the plaintiffs; that at the date of the institution of the action of ejectment the defendant was and still is in possession of the land claimed adversely to the plaintiffs; and this was all of the evidence offered by the plaintiffs.

The defendant, to maintain the issue on his part, offered the following evidence: An application signed by one A. S. Crawford for the purchase of the land in the declaration mentioned, under the provisions of section 666 of the Code, and certain papers thereto attached, marked Exhibits Nos. 1 to 17 inclusive, a deed purporting to be from one S. S. Brooke, clerk of the Corporation Court of the city of Roanoke, purporting to convey the land in the declaration mentioned to the said Crawford, dated June 27, 1903, and recorded in Deed Book 147, p. 129, and marked "Exhibit No. 1"; a deed purporting to be from A. S. Crawford conveying the land in question to Hunt Hanna; and a deed from Hunt Hanna purporting to convey the land to the defendant Wright; that on the 25th of August, 1902, and continuing through the 23d day of June, 1903, when the deed from Brooke to Crawford was made, Brooke was clerk of the

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Corporation Court for the city of Roanoke, having been duly elected and qualified as such; the act of the General Assembly of Virginia, passed February 12, 1892, by which the limits of the city of Roanoke were extended so as to embrace within the limits of the city of Roanoke the land in the declaration mentioned; proof that the grantee in the deed of June 27, 1903, took possession of said land, claiming under the said deed, and that he and those claiming under him have ever since been in possession thereof; which was all of the evidence introduced on the part of the defendant.

To the introduction of all of these papers the plaintiffs, by counsel, objected, on the ground that they do not "appear to have been made by the parties authorized to make the same, and that the proceedings therein set out are not pursuant to law and are not authorized by law, and that the same are otherwise illegal and irrelevant."

There follows this stipulation of counsel: "We consent that the foregoing and the exhibits therein referred to is all the evidence to be introduced in this case": signed by counsel for the plaintiffs and counsel for the defendants.

The case was submitted to the court without a jury, and at the May term, 1908, a judgment was entered for the plaintiffs. The court certifies that "the evidence and all the evidence produced by the parties to sustain the issue on their parts, respectively, is contained in the certificate filed with the papers in this cause and marked 'Certificate of Evidence,' which is hereby referred to and made a part of the record herein."

It seems that prior to February 12, 1892, the land in question was a part of Big Lick Magisterial District, in the county of Roanoke; that the taxes for 1891 were not paid and the land was returned and reported delinquent for that year, but all the acts which establish the delinquency, the sale of the land and its purchase by the Commonwealth, were returned to the County Court of Roanoke county and were filed in the clerk's office of that court. In 1892 the charter of the city of Roanoke was

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amended, and the land in question was brought within the limits of the city. On the 25th of August, 1902, A. S. Crawford, under whom the defendant claims, filed his application to purchase this land, under section 666 of the Code. Notice of this application was served upon Carson and Warwick, the notice stating that the land in question was sold for delinquent taxes due thereon for the year 1891 and purchased by the Commonwealth of Virginia; that it was charged on the commissioner's books to Carson and others at the time of the sale and at the time of the notice was so charged and owned by J. Preston Carson and Otway Warwick, as shown by the deed books and will books in the office of the clerk of the Corporation Court, and described as Lot No. 4, Section No. 5, Janette Land Company.

Carson and Warwick did not appear in obedience to the summons to show cause, and on the 27th of June, 1903, a deed was made by S. S. Brooke, who it is agreed was at that date clerk of the Corporation Court of the city of Roanoke, conveying to A. S. Crawford the land in question. This deed recites with accurate detail every step that was taken and which the law required to be taken in order to entitle a purchaser under section 666 of the Code to a deed for lands which had theretofore been returned delinquent for the payment of taxes and purchased by the State. No step seems to have been omitted, but all was done which the law required to be done to vest the title to land sold for taxes and purchased by the Commonwealth by virtue of section 666 of the Code.

Section 661 provides that when the purchaser of any real estate sold as aforesaid or sold in pursuance of section 666, his heirs or assigns, has obtained a deed therefor, and the same has been duly admitted to record in the county or corporation in which such real estate lies, the right or title to such estate shall stand vested in the grantee in such deed as it was vested in the party assessed with the taxes or levies on account whereof the sale was made at the commencement of the year for which said taxes or levies were assessed; or in any person claiming

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under such party, subject to be defeated only by proof that the taxes or levies for which said real estate was sold were not properly chargeable thereon; or that the taxes and levies properly chargeable on such real estate have been paid; or that the notice of the tax sale, where made to a person other than the Commonwealth, or notice of the application to purchase, in case the sale was made under section 666 has not been duly given; or that the payment or redemption of said real estate was prevented by fraud or concealment on the part of the purchaser.

Not one of the four conditions named appear in this case.

We shall not stop to inquire whether the statute intended to make the deed conclusive proof or *prima facie* proof of its recitals. It may be that it was designed as conclusive proof as to all of its recitals other than the four specified exceptions, and that with respect to the four named exceptions the deed should only constitute *prima facie* evidence. But whether it be *prima facie* or conclusive is immaterial in this case, as either the one or the other would be sufficient to establish the defendant's title, there being no proof to the contrary of any of the recitals of the deed. That it is within the power of the State to make the deed conclusive evidence as to very many of these recitals, and *prima facie* as to all of them, we think plain.

At pages 40-41 of Minor's Law of Tax Titles, it is said: "This statute operates to cure many of the defects or omissions in the proceedings for a tax sale, which otherwise would invalidate it. But its effect, as we shall presently see, is not as extensive as its terms would seem to import. The statute itself allows evidence to be introduced, in order to defeat the title, of the fact that the land was not properly chargeable with the taxes or levies for which it was sold, or that such taxes or levies had been paid. As to all other matters, the effect of the statute is, or at least is intended to be, that the execution and recordation of the tax deed is conclusive evidence of the purchaser's title. But as there are certain steps in the collection of taxes which the legislature has not the constitutional power to dis-

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pense with, because to do so would deprive the taxpayer of his property without due process of law, neither has it the power to make the tax deed conclusive as to these matters, for this would be in effect to dispense with steps which are indispensable. The owner of the land must be given an opportunity to prove that these or some of them have not been properly performed. But it is well settled that the legislature has the power to make the tax deed *prima facie* evidence of even these indispensable jurisdictional facts, and hence, though a statute attempting to make the deed conclusive thereof will fail of its effect, yet it will still be construed to make the deed *prima facie* evidence thereof, though the statute does not so provide."

Since that was written, section 661 has been enlarged, and adds the third and fourth exceptions to the effect of the deed. See *Virginia Coal Co. v. Thomas*, 97 Va. 527, 34 S. E. 486, and note upon that case in 5 Va. Law Reg. 556.

There is one other question which must be considered. As we have seen, when this land was returned delinquent and purchased by the Commonwealth, it was in the county of Roanoke, and the evidence of the various steps by which the title of the original owner was divested and placed in the Commonwealth is to be found in the clerk's office of the County Court of Roanoke. After 1892, the land having been embraced by an amended charter in the city of Roanoke, it was assessed for taxation as a part of the city of Roanoke, and all of the evidence with respect thereto is to be found in the clerk's office of the corporation court of that city.

By the express terms of section 666 the application for the purchase of this land could only be made in the corporation court of the city wherein it was situated, and the contention of the defendants in error is that, as the delinquency in the payment of taxes and the purchase by the Commonwealth, and the divestiture of the title of the defendants in error is of record in the County Court of Roanoke, the Corporation Court of the city of Roanoke was incapable of entertaining the petition

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of A. S. Crawford. The result would be that in all such cases, of which there must be many since municipal corporations are constantly enlarging their boundaries, the Commonwealth would find itself unable to dispose of land purchased by it, and would be deprived of this means of collecting its revenues; the claim of the defendants in error being that this is *casus omissus* and constitutes a *hiatus* in the law.

In this we cannot concur. The jurisdiction is clearly placed in the circuit court of the county or the corporation court of the city in which the land lies. The exercise of that jurisdiction depends upon the evidence introduced before it. We doubt whether the order of the court directing this deed is properly before us, for while there is a paper in the cause which refers to the application of Crawford, and states that he has done all of the acts which entitle him to a deed under section 666, and which requires Brooke, the clerk of the court, to execute a deed to him, it does not appear that that paper emanated from or was ever a part of the records of the Corporation Court of the city of Roanoke. But this brings us back again to the deed executed by the clerk, S. S. Brooke, and duly admitted to record, which, as we have before said, recites step by step in careful detail every act which the law requires, and upon this point, as upon others, we are confronted with the effect given by the statute to that deed.

All the evidence in the case was admitted under a stipulation entered into by counsel for plaintiffs and defendant in the court below. In the bill of exceptions signed by the judge it is stated that exhibits Nos. 1 to 18, inclusive, which embrace the deed, were objected to by plaintiffs' counsel, "on the ground that they do not appear to have been made by the parties authorized to make the same, and that the proceedings therein set out are not pursuant to law and are not authorized by law, and that the same are otherwise illegal and are irrelevant." Now if this agreement does not mean that the papers were put in evidence without preliminary proof that they were genuine and were what they purported to be, leaving it to the court to ascertain their

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**Opinion.**

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legal force and effect, then it means nothing, or indeed, as far as the defendant in the court below was concerned, worse than nothing, since but for the agreement evidence might have been introduced with respect to these papers which in consequence of it was not brought forward.

Upon the whole case, we are of opinion that the judgment of the circuit court was erroneous and should be reversed, and this court will enter judgment for the plaintiff in error and his costs.

*Reversed.*



Opinion.

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**Richmond,**

CAMP MANUFACTURING CO. v. COMMONWEALTH AND ANOTHER.

November 26, 1909.

Absent, Buchanan, J.

1. **TAXATION—Standing Trees—Assessment 1905—Act March 12, 1908—Constitutional Law.**—Where standing timber was properly assessed in 1905 in pursuance of section 171 of the Constitution, requiring the General Assembly to provide for the reassessment of real estate in the year 1905, and every fifth year thereafter, and the commissioner of the revenue, as required by section 509 of the Code (1904), merely followed that assessment in making out the land books for the year 1908, it is unnecessary to pass on the validity of the act of Assembly relating to that subject approved March 12, 1908, as the action of the commissioner was fully warranted by law independently of said act.

Error to a judgment of the Circuit Court of Brunswick county refusing to correct an alleged erroneous assessment of standing trees. Petitioner assigns error.

*Affirmed.*

The opinion states the case.

*E. R. Turnbull, Jr.*, for the plaintiff in error.

*Wm. A. Anderson, Attorney General* and *E. P. Buford*, for the defendants in error.

FILE, J., delivered the opinion of the court.

motion was brought by the plaintiff in error to obtain  
on from the payment of taxes and levies on certain  
merchantable timber trees alleged to have been er-  
7 charged to the company on the land books of the

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commissioner of the revenue for Brunswick county for the year 1908. From an order of the circuit court denying relief this writ of error was allowed.

The company insists that the assessment was made by virtue of an act of the General Assembly of March 12, 1908, which provides, among other things, that "the several commissioners of the revenue of this State shall, on or before the fifteenth day of May, 1908, and every year thereafter, specially and separately assess at the fair market value all mineral lands and the improvements, fixtures and machinery thereon, and all standing merchantable timber trees heretofore or hereafter sold and conveyed to parties not owning the surface within their respective districts, and shall enter the same on the land books, . . . separately from other lands charged thereon, and shall extend the taxes upon said lands, improvements, fixtures and machinery, and said standing merchantable timber trees, assessed as aforesaid, at the rate fixed by law upon tangible property. . . ." (Acts 1908, ch. 220, p. 331.)

It is contended that this act is in conflict with section 171 of the Constitution of Virginia, which declares that "The General Assembly shall provide for a reassessment of real estate in the year 1905, and every fifth year thereafter . . ."

Virginia Code, 1904, sec. 437, provides for the appointment of assessors to assess the lands within the Commonwealth in the year 1905, and every fifth year thereafter, as contemplated by section 171.

Accordingly, in the year 1905, the assessors of Brunswick county assessed the standing merchantable timber in question, the validity of which assessment, as the basis of taxation until the reassessment to be made the fifth year thereafter, was sustained by this court in the case of *Commonwealth v. Camp Mfg. Co.*, 109 Va., 63 S. E. 978.

In making out the land books for the year 1908 on which these taxes were extended—as required by Va. Code, 1904, sec. 509—the commissioner of the revenue merely followed the assessment of 1905.

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We are of opinion that the action of the commissioner was fully warranted by law, independently of the act of March 12, 1908, and consequently that the validity of the taxes would not be affected, even though the act should be declared unconstitutional. It is unnecessary, therefore, to pass upon that question in this case.

We find no error in the order of the circuit court, and the same is affirmed.

*Affirmed.*

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Statement.

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**Richmond.**

ARENTS v. CASSELMAN &amp; Co.

January 13, 1910.

Absent, Buchanan, J.

1. **CONTRACTS—Renewal—Question for Jury—Ratification of Agent's Acts.**—If a contract of employment between A and a firm has been revoked by the withdrawal of one of the members of the firm, and the remaining members of the firm continue to conduct the business as a new firm, and A, through his agent, repeatedly urges the new firm to carry out the contract, and they undertake to do so, in an action by the new firm against A to recover the consideration of the contract, the question should be submitted to the jury whether or not there had been a renewal or continuation of the original contract.
2. **INSTRUCTIONS—Different Phases of Case—Evidence to Support Each.**  
Where the pleadings present several views of a case, and there is evidence tending to establish each sufficient to support the verdict of a jury, it is proper to instruct the jury on each view.
3. **INSTRUCTIONS—Invited Error.**—If proper instructions have been given at the instance of a plaintiff upon the several phases of his case as presented by the pleadings and proofs, and thereafter an instruction, inconsistent with the plaintiff's instructions, is given at the instance of the defendant, the latter cannot complain thereof, as the error was invited by him.

Error to a judgment of the Circuit Court of Henrico county in an action of *assumpsit*. Judgment for the plaintiffs. Defendant assigns error.

*Affirmed.*

The opinion states the case.

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Opinion.

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*Henry R. Miller and R. M. Jeffress*, for the plaintiff in error.

*Isaac Diggs and L. O. Wendenburg*, for the defendants in error.

HARRISON, J., delivered the opinion of the court.

This action of *assumpsit* was brought by the plaintiffs, Casselman & Company, to recover of the defendant, George Arents, commissions alleged to be due them upon a sale claimed to have been made by them, or through their instrumentality, of a farm belonging to the defendant. To a verdict and judgment for \$900 in favor of the plaintiffs this writ of error was obtained by the defendant.

The record shows that on July 14, 1904, the real estate firm of Casselman & Co., composed of J. R. Hockaday and Laurence Casselman, were authorized in writing by Thomas F. Jeffress, agent for the defendant, to sell a farm in Henrico county, known as Bloomingdale, containing 280 acres, for \$50,000. This contract provided that, if the sale was made by Hockaday, Casselman & Co., or through their instrumentality, they should have three *per cent.* commissions on the gross sale to be paid out of the cash payment. In December, 1904, J. R. Hockaday retired from the firm of Casselman & Co., and Casselman continued the business under the firm name of Casselman & Co. until May, 1906, when George C. Wiles was admitted as a partner of Casselman, and the business continued under the firm name of Casselman & Co.

On the 14th of May, 1907, Thomas F. Jeffress, as agent for the defendant, entered into a written contract of sale of Bloomingdale to W. R. Smith, executor, for the sum of \$30,000, of which \$5,000 was paid in cash.

The defendant assigns as error the action of the circuit

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court in admitting as evidence, for any purpose, the contract of July 14, 1904, by which Hockaday, Casselman & Co. were authorized to sell Bloomingdale, and in refusing to exclude it when the plaintiffs failed to prove a renewal of that contract with the defendant; and in submitting to the jury, for its determination, the question whether the facts shown in evidence constituted a renewal of that contract as between the plaintiffs and the defendant, after it was terminated by the withdrawal of J. R. Hockaday from the firm of Casselman & Co.; it being insisted that the facts in reference to the matter were clear and uncontroverted, and the question, therefore, one for the court to decide.

The record shows that the contract of July 14, 1904, was only introduced for the purpose of showing its terms, with the announcement by the court that it was revoked by the withdrawal of J. R. Hockaday from the firm, and that it would be excluded unless it was shown to have been thereafter renewed with Casselman & Co.

It is clear that the contract in question was not renewed in writing with Casselman & Co. after the withdrawal of J. R. Hockaday from the firm, but the acts of the parties tend strongly to show that the understanding between them was that the plaintiffs, in their subsequent efforts to sell the farm, were proceeding to carry out the contract made with the firm before the withdrawal of J. R. Hockaday. Without the slightest suggestion from the defendant that the contract was not in force, he was, through his agent, repeatedly urging the plaintiffs to activity in the matter of finding a purchaser for the Bloomingdale farm, and until the sale was consummated the farm was advertised in the literature sent out by the plaintiffs as real estate agents.

The evidence was clearly such as to make it proper for the court to submit to the jury the question, whether or not there had been a renewal or continuation of the original contract. *Ice v.*

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*Maxwell*, 61 W. Va. 9, 55 S. E. 899. The question is analogous to the ratification of an agent's act by the subsequent conduct of the defendant, which this court has held to be properly submitted to the jury. *Horton v. Townes*, 6 Leigh 47, 57-60.

It is further assigned as error that instructions Nos. 1, 2 and 3, asked for by the plaintiffs, misdirected the jury and were in conflict with instruction No. 9, given at the instance of the defendant.

The declaration of the plaintiffs presents their case in the three following aspects:

First: That Casselman & Co. were successors in business to Hockaday, Casselman & Co.; that as such successors in business the written contract of July 14, 1904, came into their hands; that it was continued and ratified by the defendant, and the property allowed to remain for sale in the hands of the new firm upon the terms of that contract; and that the contract contained a clause that if the property was sold through the instrumentality of the agents then they should be entitled to their commissions.

Second: That the defendant verbally authorized the plaintiffs to sell Bloomingdale, and that although the contract with Hockaday, Casselman & Co. was not revived and continued in their hands, yet if they sold the property they were entitled to reasonable compensation for making the sale.

Third: That the plaintiffs brought the purchaser from West Virginia and made the sale to him; that before the sale was concluded they had notified the defendant that the intended purchaser was their customer, and the defendant accepted the services of the plaintiffs in making the sale, and was, therefore, liable to the firm upon a *quantum meruit*.

There was evidence tending to establish each of these three phases of the plaintiffs' case, and the jury might have found for the plaintiffs upon either view, namely: that the contract of July 14, 1904, had been renewed and continued in the hands of the

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plaintiffs, or that the defendant had verbally authorized the plaintiffs to sell, or that the defendant had accepted the services of the plaintiffs in making the sale, and was, therefore, liable upon a *quantum meruit*. *Ice v. Maxwell, supra*.

Instructions 1, 2 and 3 given for the plaintiffs are free from reasonable objection. They state the law applicable to each view of the plaintiffs' case, and, in their order, properly submit each phase thereof to the jury.

The defendant contended that the contract of July, 1904, was not revived, and that the plaintiffs were not the efficient means of bringing about the sale. This opposing view of the defendant the court undertook to submit to the jury by instruction No. 9, and there is no such conflict between this instruction and those given for the plaintiffs as would mislead the jury. Moreover, if giving instruction No. 9, upon the invitation of the defendant, produced any conflict with the correct instructions given for the plaintiffs, it was erroneous, and the defendant cannot complain of error that he has invited. *Traction Co. v. Hildebrand*, 98 Va. 22, 34 S. E. 888.

The failure of the court to set aside the verdict as contrary to the law and the evidence is assigned as error.

The defendant is before this court as a demurrant to the evidence. The case was properly submitted to the jury and they gave credit to the witnesses for the plaintiffs rather than to those of the defendant. Taking this view, the evidence was ample to support the verdict, and upon well settled principles it cannot be disturbed.

The judgment must, therefore, be affirmed.

*Affirmed.*



Syllabus.

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**Richmond.**

ATLANTIC COAST LINE RAILROAD COMPANY v. CAPLE'S ADMINISTRATRIX.

January 13, 1910.

Absent, Buchanan, J.

1. INSTRUCTIONS—*Evidence to Support—Case at Bar—Accidental Death—Freedom of Decedent from Fault.*—Where, in an action for wrongful death, there is ample evidence to support the theory that the death of plaintiff's intestate was purely accidental, and not the result of the defendant's negligence, an instruction which tells the jury they must find for the defendant if they believe from the evidence that the decedent came to his death as the result of a mere accident, although he was himself free from fault, should be given. To add to such instruction: If the accident was "not caused in any manner by the defendant's fault or negligence" is calculated to confuse and mislead the jury, if not to defeat the purpose of the instruction.
2. NEGLIGENCE—*Probabilities.*—If it is just as probable that an injury inflicted on a plaintiff was purely accidental as that it was inflicted through the negligence of the defendant, the verdict should be for the defendant.
3. PLEADING—*Allegation and Proof—Evidence.*—The proof in a cause must correspond with the allegations of the pleadings. A plaintiff cannot allege one set of facts in his declaration, and recover upon proof of an entirely different set of facts.
4. INSTRUCTIONS—*Partial View of Evidence—Directing Verdict—Contributory Negligence.*—Where the contributory negligence of the plaintiff is relied on as a defense to an action of tort, and the evidence tends to support that view of the case, it is error to instruct the jury to find for the plaintiff if they believe that the defendant was negligent, ignoring entirely the contributory negligence of the plaintiff. An instruction, especially one directing a verdict for the plaintiff or the defendant, which is based upon a partial view of the evidence is erroneous, and should not be given.
5. INSTRUCTIONS—*Contradiction—Verdicts.*—If contradictory instructions are given on a material point in a case, the verdict of the jury should be set aside, as it cannot be said whether the jury were controlled by the one or the other.

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6. INSTRUCTIONS—*Directing Verdict—Relative Duties of Both Parties.*

In an action of tort, where the contributory negligence of the plaintiff is relied upon as a defense, it is the better practice that instructions which lay down the law as to the duty of the defendant should not conclude with a direction to find for the plaintiff unless they also contain a statement of the corresponding duty of the plaintiff to exercise reasonable care for his own safety.

7. EVIDENCE—*Experts—Opinions—When Not Admissible.*—Generally the opinions of witnesses are inadmissible in evidence. Witnesses can testify to facts only, and not to opinions or conclusions based on facts. If all the relevant facts can be, or have been, introduced before the jury, and they are able to deduce a reasonable inference from them, no reason exists for receiving opinion evidence, and it is inadmissible.

Error to a judgment of the Corporation Court of the city of Manchester in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

*Reversed.*

The opinion states the case.

*Edwin P. Cox* and *Wm. B. McIlwaine*, for the plaintiff in error.

*George J. Hooper*, *D. C. O'Flaherty* and *M. J. Fulton*, for the defendant in error.

HARRISON, J., delivered the opinion of the court.

In October, 1906, Norman Caple died from injuries received by him a few hours before his death, while in the employ of the plaintiff in error as one of a switching crew in its Manchester yards. The alleged negligence of the defendant company in causing his death is the ground of this action brought by his administratrix for damages.

The record shows that the deceased lost his life during the operation of making what is known as a flying switch, and while

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he was engaged in uncoupling the engine from the cars. The theory of the plaintiff, as shown by her declaration, was that the deceased was on the rear step of the engine in a stooping position, drawing out the coupling pin, and that without waiting for a signal to do so from the deceased, which was his alleged duty, the engineer negligently and suddenly increased the speed of the engine and threw or jerked the plaintiff's intestate upon the tracks, immediately in front of the moving cars, which were following the engine, thereby causing his death.

The theory of the defendant was that the deceased was standing on the ladder of the car and lost his hold and fell, as the result of a pure accident, for which the defendant was not responsible; and that, if this was not so, the deceased was guilty of such contributory negligence as to preclude a recovery by his administratrix.

There was a verdict and judgment for the plaintiff, which this writ of error brings under review.

We find no error in the action of the circuit court in overruling the demurrer to the plaintiff's declaration.

We will consider first the assignments of error which challenge the action of the circuit court in refusing and modifying certain instructions asked for by the defendant.

Instruction No. 13, as asked for, was as follows: "The court instructs the jury that if they should believe from the evidence that Norman Caple was injured as a mere accident, they must find for the defendant, and this although they may believe Norman Caple was also free from fault."

The court modified this instruction so as to make it read as follows: "The court instructs the jury that if they should be-

lieve the evidence that Norman Caple was injured as a  
it, *not caused in any manner by defendant's fault or*  
they must find for the defendant, and this although  
lieve Norman Caple was also free from fault."

s in italics show the modification, which was well  
confuse and mislead the jury, if not to defeat the

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purpose of the instruction. The instruction should have been given as asked. The view of the defendant that the death of the deceased was the result of a mere accident was supported by ample testimony to entitle it to a proper instruction submitting that theory of the case to the jury. *Martin v. Traction Co.*, 102 Va. 209, 212, 45 S. E. 886.

The eighteenth instruction, as offered by the defendant, set forth certain acts of negligence charged by the plaintiff against the defendant company, and concluded with the statement: "Yet, notwithstanding they may so believe, the jury must find a verdict for the defendant company, if they shall further believe from the evidence that the death of the said Norman Caple was caused by his missing his hold while ascending the ladder of the car that was being switched, thereby falling on the track in front of the same, and that ascending such ladders on moving cars was a part of his duty and that he had sufficient experience to know how to perform his duty."

This instruction was modified by inserting between the word "hold" and the word "while" the words "*by his own fault or misfortune and not because of defendant's fault or negligence.*"

The twelfth instruction offered by the defendant told the jury that if they believed it to be as probable that the accident happened by his falling from the car as that he was jerked from the engine, as charged in the declaration, they must find for the defendant.

The modification of instruction eighteen changed its meaning and purpose, and permitted the jury to find for the plaintiff, whether the negligence which caused the injury had been alleged in the declaration or not. It ignored the theory of the defendant, that if the deceased fell from the ladder on the car by missing his hold, after the engine had moved away from it, that no responsibility resulted to the defendant therefrom. Further, the object sought by instruction twelve, which was refused, and instruction eighteen, which was modified, was to limit the plain-

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tiff's proof to the allegations of the declaration. This had not been done in any of the other instructions. The plaintiff could not recover except under the averments of her declaration; she could not allege one set of facts, and recover if another set of facts were true. *Richmond Ry. & Elec. Co. v. West*, 100 Va. 184, 40 S. E. 643; *Moore v. B. & O. R. Co.*, 103 Va. 189-194, 48 S. E. 887.

Both the twelfth and eighteenth instructions were applicable to the facts of the case, and should have been given as asked.

Instructions two and four, given for the plaintiff, contain a complete statement of the plaintiff's case. They inform the jury, that, if they believe from the evidence that the defendant's engineer did not exercise proper care and caution, and that this lack of care and caution was the proximate cause of the death of the plaintiff's intestate, then they must find for the plaintiff. They in effect said to the jury, that if the defendant was negligent, their verdict should be for the plaintiff, ignoring the important element necessary to entitle the plaintiff to recover—that is, an absence of contributory negligence on the part of her intestate. The defense of contributory negligence was relied on, and the evidence tended to sustain that view of the case, but this theory was improperly left out in giving these instructions. This court has often held, that when an instruction, especially one which directs the jury to find for the plaintiff or defendant, is based upon a partial view of the evidence, it is erroneous. *Vaughan M. Co. v. Staunton T. Co.*, 106 Va. 445, 452, 56 S. E. 140.

The defect in these instructions is not cured by instructions given for the defendant with respect to contributory negligence. That makes a case of contradictory instructions upon a material point, which would require the verdict of the jury to be set aside, as it cannot be said whether the jury were controlled by the one or the other. *C. & O. Ry. Co. v. Whitlow*, 104 Va. 90, 51 S. E. 182; *Southern Ry. Co. v. Hansbrough*, 107 Va. 733, 748, 60 S. E. 58.

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Without further detail, it is sufficient to call attention to the fact that other instructions given for the plaintiff are subject to criticism on account of the objection pointed out to instructions Nos. 2 and 4, and that on another trial care should be observed to avoid that objection. It is always the better practice in cases like this, that instructions which lay down the law with respect to the duty of the defendant, should not conclude with a direction to find for the plaintiff, unless they also contain a statement of the corresponding duty of the plaintiff to exercise reasonable care for his own safety. *C. & O. Ry. Co. v. Rogers*, 100 Va. 324, 332, 41 S. E. 732.

Bill of exception No. 7 was taken to the action of the court in allowing W. P. Borland, a witness called by the plaintiff, to testify as an expert concerning the position which the deceased should have occupied when he was injured. The facts hypothetically stated were taken from conflicting statements made by various witnesses, and the witness replied that, in the circumstances set out in the question, it would necessarily have been the duty of the deceased to be on the foot-board of the engine.

The question did not call for the answer of an expert witness. All of the facts touching the matter involved in the question were fully before the jury and easily understood, and needed no elucidation by an expert. The witness was merely expressing an opinion which the jury was as capable of expressing as he was. No principle of law is better settled than that the opinions of witnesses are in general inadmissible; that witnesses can testify to facts only and not to opinions or conclusions based upon the facts. *Southern Ry. Co. v. Mauzy*, 98 Va. 692, 694, 37 S. E. 285.

While the general rule is as stated, there are exceptions to it; but there is no reason in this case for making an exception. When all relevant facts can be or have been introduced before the jury, and the latter are able to deduce a reasonable inference from them, no reason exists for receiving opinion evidence, and it is inadmissible. *Iron, &c., v. Tomlinson*, 104 Va. 254,

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51 S. E. 362; *Va. Car. Chem. Co. v. Knight*, 106 Va. 674, 676, 56 S. E. 725.

As the case has to go back for the errors already pointed out, it is not necessary to consider other questions that may not arise on another trial.

The judgment complained of must be reversed, the verdict of the jury set aside and the case remanded for a new trial.

*Reversed.*

Syllabus.

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**Richmond.**

BRADLEY & Co. v. CITY OF RICHMOND.

January 13, 1910.

Absent, Buchanan, J.

1. MUNICIPAL CORPORATIONS—*Ordinances—Publication—Notice*

One who has had and availed himself of every private advantage that he could have enjoyed if a city ordinance had been published in the manner required by the city charter cannot complain of the want or insufficiency of such publication as he has not been prejudiced thereby. The object of publication is to give notice, and this the party has had.

2. MUNICIPAL CORPORATIONS—*Taxation—License—Ad Valorem*

A municipal corporation, possessing general powers of taxation, must determine primarily whether a particular business is to be reached by the *ad valorem* system, and its discretion in this matter cannot be interfered with by the courts except in case of plain deviation from the constitutional requirement. The question is one of power and not of policy so far as the rights of the citizen are concerned. In the case at bar the imposition by the City of Richmond of a license tax of \$800 on the plaintiffs in their capacity as private bankers, cannot be said to be a plain deviation from the constitutional requirement.

3. TAXATION—*Licenses—License and Ad Valorem Not Double*

It is not double taxation to impose a license tax on a business and at the same time to tax the capital used by the business under the *ad valorem* system.

4. MUNICIPAL CORPORATIONS—*License Tax—Equality and Uniformity*

A city ordinance which imposes the same license tax on all businesses of the same class does not violate a charter requirement that the tax shall be equal and uniform upon all property, real and personal.

5. TAXATION—*Amount—Legislative Discretion—Power of*

*Municipal Corporations.*—The power of taxation, under the system of government, rests with the legislative and not the judicial department, and its province cannot be invaded by the courts. Where the power to tax for revenue purposes is given to the legislature, the amount of the tax is in the discretion of the legislature.



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and may be carried to any extent, within the jurisdiction of the State or corporation imposing it, which the will of such State or corporation may prescribe. If the power is exercised in an unwise, unjust or oppressive manner to any particular class, the appeal must be to the justice and patriotism of the representatives of the people, and not to the courts.

6. MUNICIPAL CORPORATIONS—*License Tax—Ad Valorem System—Section 170 of the Constitution.*—A city ordinance imposing a license tax on a private banker and also an *ad valorem* tax on the capital employed in his business is not prohibited by section 170 of the Constitution, which provides for the imposition of license taxes on any business that cannot be reached by the *ad valorem* system.
7. CONSTITUTIONAL LAW—*Equality—License Taxes.*—The provisions in the Constitution requiring equality and uniformity of taxation apply only to a direct tax on property, and not to license taxes, which do not admit of a tax strictly equal and uniform in the sense contended for. This is clear from sections 168 and 170 when read together.
8. MUNICIPAL CORPORATIONS—*License Taxes—Classification—Illegality.* It is competent for a city to classify different occupations for the purpose of imposing license taxes, and, in order to render a classification illegal, the party assailing it must show that the business discriminated against is precisely the same as that included in the class which is alleged to be favored.
9. MUNICIPAL CORPORATIONS—*Taxation—Notice—"Due Process."*—If, after an assessment of taxes has been made by a city, the taxpayers are notified of a time and place when they may be heard in opposition thereto by a committee of the city council, with a right of appeal to the council by all who feel themselves aggrieved by the action of the committee, this constitutes "due process of law," and a sufficient opportunity to be heard.

Error to a judgment of the Hustings Court of the city of Richmond, affirming a judgment of the police justice, imposing a fine on the plaintiff in error.

*Affirmed.*

The opinion states the case.

*Smith, Moncure & Gordon*, for the plaintiff in error.

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*H. R. Pollard and George Wayne Anderson*, for the defendant in error.

HARRISON, J., delivered the opinion of the court.

In this case F. S. Bradley complains of a judgment rendered against him by the Hustings Court for the city of Richmond, to which the whole matter of law and fact was submitted, affirming a judgment of the police justice imposing upon him a fine of \$25.00 and costs for conducting the business of a private banker without having paid the license tax of \$800 assessed against him for the privilege.

The plaintiff in error contends that the council of the city of Richmond did not designate the daily newspaper in which the ordinance imposing the penalty in this case was to be published, and that although published five times in a daily newspaper, as the charter requires, the ordinance is invalid for the lack of that designation. City Charter, sec. 21.

It is by no means clear that this provision of the charter has not been complied with. It is, however, unnecessary to consider that question. The object of requiring publication was to give notice of the ordinance and of its penalty before the penalty was inflicted. The record shows that this end was fully attained. The ordinance was published five times, and the plaintiff in error had notice of it, and appeared by his counsel, as was his right under the ordinance, before the finance committee of the council and asked an abatement of the assessment against him. It is, therefore, apparent that the plaintiff in error was not prejudiced by the alleged failure of the council to designate the paper in which the ordinance was published. He has had and availed himself of every privilege or advantage that he could have enjoyed had the ordinance been published in exact conformity with his present contention.

Every other question raised in the petition for this writ of error has been repeatedly decided by this court adversely to the contention there made.

It is insisted that the ordinances and assessment thereunder

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are in conflict with sections 69 and 70 of the city charter. The alleged matter of conflict is that the city has imposed a license tax on the plaintiff in error, as a private banker, and has, at the same time, assessed an *ad valorem* tax on the capital employed in his business.

This action of the city is not in conflict with its charter. There are numerous decisions of this court holding that a municipality possessing general powers of taxation, must determine primarily whether a particular business can be reached by the *ad valorem* system, and its discretion in the matter cannot be interfered with by the courts except in a case of plain departure from the constitutional requirement. The question is one of power and not of policy, so far as the courts are concerned. It cannot be said that the imposition of a license tax on the business of the plaintiff in error is a plain departure from the constitutional requirement. Under similar charters, such action on the part of city councils has been repeatedly sanctioned. *Postal Telegraph-Cable Co. v. City of Norfolk*, 101 Va. 125, 43 S. E. 207; *Gordon Bros. v. Newport News*, 102 Va. 649, 47 S. E. 828; *N. & W. Ry. Co. v. Suffolk*, 103 Va. 498, 49 S. E. 658; *Ins. Co. v. City of Winchester*, ante, p. 451, 66 S. E. 84. It is not double taxation to impose a license tax on a business and at the same time to tax the capital used by the *ad valorem* system. *Morgan's Case*, 98 Va. 812, 35 S. E. 448; *Newport News, &c., Co. v. Newport News*, 100 Va. 161, 40 S. E. 645; *Norfolk v. Griffith*, 102 Va. 115, 45 S. E. 889.

It is further contended that the assessment in question is in conflict with section 69 of the charter, which provides that taxes shall be equal and uniform upon all property real and personal.

The record shows that the plaintiff in error and ten other private bankers were put in the first class and each assessed with a license tax of \$800. Such license taxes are not contrary to the provision requiring equality and uniformity if all in the same class are required to pay the same tax. *Ould, &c. v. City of Richmond*, 23 Gratt. 464, 14 Am. Rep. 139; *Commonwealth v. Moore*, 25 Gratt. 951; *Norfolk v. Norfolk Landmark*, 95 Va.

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564, 28 S. E. 959; *Morgan's Case, supra*; *Newport News, &c., Co. v. Newport News, supra*.

It is further contended that the ordinance and the action of the council committee under it were unreasonable, and on this account invalid.

The power of taxation, under our system of government, rests with the legislative and not with the judicial department, and its province cannot be invaded by the courts. Where the power to tax for revenue purposes exists, the amount of the tax is in the discretion of the legislative body, and it may be carried to any extent within the jurisdiction of the State or corporation which imposes it which the will of such State or corporation may prescribe. If the power is exercised in an unwise, unjust and oppressive manner to any particular class, the remedy, within constitutional bounds, is by an appeal, not to the courts, but to the justice and patriotism of the representatives of the people. *Ould, &c. v. Richmond, supra*; *Com'th v. Moore, supra*; *Norfolk v. Norfolk Landmark, supra*; *Woodall v. Lynchburg* 100 Va. 318, 40 S. E. 915.

It is further insisted that the ordinance and assessment are invalid because in conflict with section 170 of the Constitution of Virginia, providing for the imposition of license taxes on any business that cannot be reached by the *ad valorem* system.

In answer to this contention, we need only cite, without comment, the recent case of *Insurance Co. v. Winchester, supra*.

The position is taken that the ordinance and assessment are invalid because in conflict with section 168 of the State Constitution, which provides that all taxes, whether State, local or municipal, shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax.

The provisions in the Constitution requiring equality and uniformity of taxation apply only to a direct tax on property, and not to license taxes, which do not admit of a tax strictly equal and uniform in the sense contended for. *Helfrick's Case*, 29 Gratt. 844. When sections 168 and 170 of the Constitution are read together it is clear that it was not intended to include a

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license tax upon a business in any of the provisions speaking of taxes on property. It was competent for the council to assign private bankers to different classes, and the plaintiff in error was required to pay no greater license tax than all others in the same class with himself. In order to render the classification illegal, the party assailing it must show that the business discriminated against is precisely the same as that included in the class which is alleged to be favored. *Norfolk, &c., v. Norfolk*, 105 Va. 139, 52 S. E. 851. This has not been shown in the present case. On the contrary, it appears that the business of the plaintiff in error is not precisely the same with that of other private bankers who are put in a different class and assessed with a less license tax.

Lastly, it is contended that the ordinance and the assessment are in violation of the State and Federal Constitutions guaranteeing due process of law.

Chapter 13, sec. 15, of the City Code, provides that the finance committee, after making the classification, shall return the same to the auditor on or before the first day of April, who is required promptly to give notice by due advertisement in two or more papers that such classification is lying in his office open to inspection, and that at times and places therein to be specified the committee will meet to hear all persons complaining of the assignment made of themselves, but further providing the right of appeal to all persons feeling themselves aggrieved by the action of the committee to the council of the city of Richmond. This remedy has been held to give the party aggrieved sufficient opportunity to be heard, and the plaintiff in error has availed himself of it. *Ould & Carrington v. City of Richmond*, *supra*. See also *King v. Portland*, 184 U. S. 61, 46 L. Ed. 431, 22 Sup. Ct. 290; *Telephone, &c., Co. v. Los Angeles*, 211 U. S. 265, 53 L. Ed. 176, 29 Sup. Ct. 50.

There is no error in the judgment complained of and it is affirmed.

*Affirmed.*

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Syllabus.

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**Richmond.****CHESAPEAKE AND OHIO RAILWAY CO. v. GHEE'S ADMINISTRATION.**

January 13, 1910.

Absent, Buchanan, J.

1. **DEATH BY WRONGFUL ACT—Evidence—Pecuniary Condition of Plaintiff.**—In an action for death by wrongful act or neglect, evidence of the pecuniary condition of the deceased at the time of his death is inadmissible. Such evidence is calculated to excite the sympathy of the jury, and, if received, is presumed to have wrongfully affected the verdict.
2. **MASTER AND SERVANT—Railroads—Personal Injury—Instructions—Partial View of Evidence.**—Where an employee of a railroad company is killed in a tunnel rendered so dark by the smoke from a passing train that a lantern would cast a light only a few feet, an instruction which points out with particularity the care and precautions owing by the company, but ignores the duty that rested upon the decedent to exercise a higher degree of care for his own safety than under ordinary conditions, is erroneous and should not be given.
3. **MASTER AND SERVANT—Mutual Duty of Care—Ordinary Work.**—An employee working in a tunnel from time to time filled with smoke from passing trains is engaged in work which is ordinary as regards the relation of employer and employee to each other, and the one is as much required to exercise care commensurate with the danger of the situation as the other.
4. **MASTER AND SERVANT—Instructions—Evidence to Support.**—An instruction defining the duty of one who has placed another in a position of peril is clearly erroneous where there is no evidence which proves or tends to prove that the injured party was placed in a position of peril by any act of commission or omission on the part of the person sought to be held liable for the injury.
5. **MASTER AND SERVANT—Negligence—Contributory Negligence—Ignorance of Danger.**—A plaintiff cannot recover if he is guilty of negligence proximately contributing to the injury of which he complains, although the danger to which he was exposed was not so

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plain and clear that he was necessarily at fault in not apprehending it. Negligence may be independent of danger.

6. DEATH BY WRONGFUL ACT—*Elements of Damage*.—In an action by a widow to recover for the wrongful death of her husband the jury may, in addition to the pecuniary loss sustained by her, add compensation for the loss of his care, attention and society, and also such further sum as they may deem fair and just by way of solace and comfort to her for the sorrow, suffering and mental anguish occasioned to her by his death.
7. MASTER AND SERVANT—*Railroads—Warnings—Customary Warnings—Reasonable Precautions*.—Where, in an action against a railroad company to recover for the death of an employee alleged to have been occasioned by the failure to give proper warning of the approach of one of its trains through a tunnel filled with smoke, the company asks an instruction that the jury shall find for the defendant if they believe that certain designated warnings were given, and these were the usual and customary warnings, it is not error for the court to add “and were in themselves reasonable precautions under all circumstances and facts of this case to be taken for the safety of employees working in the tunnel.”
8. INSTRUCTIONS—*Jury Fully Instructed*.—It is not error to refuse to instruct on a point already sufficiently covered by other correct instructions given in the case.
9. DEATH BY WRONGFUL ACT—*Avoiding Injury—Conduct of Prudent Persons—Instructions*.—Where an instruction tells the jury they must find for the defendant, if they believe the plaintiff's intestate would have avoided injury if he had adopted a designated course of conduct, it is not error for the trial court to add “and that a reasonably prudent person, under the facts and circumstances of this case, would and should have done so.”

Error to a judgment of the Law and Equity Court of the city of Richmond in an action of trespass on the case. Judgment for the plaintiff. The defendant assigns error.

*Reversed.*

The following instruction on the measure of damages was given at the instance of the plaintiff:

“(H) The court instructs the jury that if they believe from the evidence that plaintiff should recover damages of the defendant company, they should find for the plaintiff and assess the damages for such killing at such sum as they may deem

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fair and just under all the circumstances of the case, such damages not to exceed \$10,000.00. In ascertaining such damages the jury should find for same with reference—

“(1) To the pecuniary loss sustained by Mary Ghee, wife of George Ghee, by the death of said George Ghee, fixing the same at such sum as would be equal to the probable earnings of the said George Ghee, taking into consideration the age, business capacity, experience, habits, energy and perseverance of the deceased during what would probably have been his lifetime and the lifetime of the said Mary Ghee, if he had not been killed.

“(2) In ascertaining the probability of life, the jury have a right to determine the same in reference to recognized scientific tables relating to the expectation of human life.

“(3) By adding thereto compensation for the loss of his care, attention and society to his wife, and

“(4) By adding such further sum as they may deem fair and just by way of solace and comfort to his wife for the sorrow, suffering and mental anguish occasioned to her by his death.”

This instruction was objected to for the following reasons:

“Instruction ‘H’ given by the court is taken from the Noel case, 32 Gratt. 394. A reading of the cases decided by this court since *Mathews v. Warner*, 29 Gratt. 570, shows that the correctness of this instruction has been doubted. Does the statute contemplate compensation or punishment to the wrongdoer in addition to compensation? There can be no reasonable doubt that the object of the statute was to make compensation for the loss sustained by the beneficiaries named. That compensation from the necessity of the case is pecuniary, and when the jury has been told they can give all the man would have earned had he lived, they have reached the limit of compensation to the beneficiaries for the loss of the decedent, and for them to be allowed to add to this amount two other amounts for things not measurable in dollars and cents authorizes them to pass into the realm of punishment. See Judge Staples’ dissent

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in Noel case. This matter has been frequently brought to the attention of the court, and is only mentioned now to prevent it being considered that the writer acquiesces in the correctness of this line of decisions.”

*Henry Taylor, Jr.*, for the plaintiff in error.

*Bibb & Bibb*, for the defendant in error.

CARDWELL, J., delivered the opinion of the court.

The widow and personal representative of George Ghee, deceased, brought this action and recovered a judgment against the Chesapeake and Ohio Railway Company for \$2,000 damages for the death of the decedent, caused, as alleged, by the negligence of the defendant.

George Ghee was, on March 30, 1907, and for a month or more previous to that date, an employee of the Chesapeake and Ohio Railway Company, together with other laborers engaged in putting down a double track for the defendant company in and through Alleghany tunnel. The work had progressed to the point where the ties and rails of the new track had been laid, but the track had not been lined up, and the laborers were engaged on the day of this accident to Ghee in loading flat cars with material gotten from each side of the new track, called the “eastbound” track, and they had been so engaged since early in the morning, but had not entirely loaded the cars. A freight train passed through the tunnel just before time for the laborers to stop for dinner—that is, about twelve o’clock—when the men were ordered to go out the east end of the tunnel and get dinner. This freight train had an engine in front and one pushing behind, and when this is the case the tunnel is so filled with smoke that no work can be done for some time, varying from a half to one and a half hours. When it was ascertained that this train would pass through the tunnel

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and the laborers were directed to stop work and get their dinner, they were also directed to put their tools on the flat cars which stood on the eastbound track and had not been completely loaded. This they did, and all of the laborers except Ghee passed out of the tunnel before the freight train going east passed them, or they were passed by the train when so near the east portal of the tunnel as to be in the daylight. The camp cars to which the laborers were going for dinner were some distance from the east portal of the tunnel, and the engine of the work train to which the cars being loaded belonged was at Tuckahoe, a station just west of the tunnel. The conductor of the work train, as seems to have been usual, put one of the brakemen on the freight train with a staff to go through to the telegraph office on the east side of the tunnel, thereby providing that no train should pass through the tunnel until he came through with the engine and flat cars to the telegraph office, as the new track had not been lined up and it was not safe for two trains to pass in the tunnel with the track in that condition. The object in going through with the work train was that the train crew might get their dinner, and get the flats on which the laborers had been working for some hours unloaded, and the engine to push this train started through on the new track some minutes after the freight had passed, sounding its whistle as it entered the tunnel and ringing its bell all the way through. The evidence is conflicting as to whether or not it was the custom of the defendant to move these flat cars until they were fully loaded. However, the engine was attached to the west end of the flat cars standing on the eastbound track in the tunnel, and moved forward slowly, the smoke being so dense and making the darkness so great that a lighted torch or lantern could not be seen farther than from three to five feet, and did not enable a person to see an object by it at all. The engine moved very slowly until it reached the cars and coupled to them, and then pushed them on east out of the tunnel, coming out of the east end of the tunnel about two minutes behind the freight train which had just preceded it.

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When he and his colaborers were ordered out of the tunnel to get their dinner, Ghee, instead of going for his, asked a companion to bring it to him, and upon his not appearing for dinner search was made for him and he was found dead, lying on the north end of the ties alongside of the rail about three hundred feet from the east portal of the tunnel, having been run over by the cars.

The darkness caused by the smoke usual after a train passes through the tunnel is very great, and while it lasts it is dangerous to be on the tracks, as one cannot see and lights cannot be seen, and therefore the men were all frequently told that when this was the case to get out of the track and clear themselves between the tracks and the walls of the tunnel, which was a safe place, but disagreeable on account of water and mud on the side. Ghee was working with the gang which was nearest to the east portal of the tunnel, according to the defendant's view of the evidence, but farthest from the east portal, according to the plaintiff's view of the evidence; but for some reason not explained in the evidence Ghee did not pass out of the tunnel along with the other laborers. All of the other laborers had time to reach the east portal of the tunnel, or very near thereto, before the freight train passed; some of the foremen being within two hundred feet of the east portal when the train passed, and it is clear from the evidence that as the material train passed along with the cars in front of the engine, the brakes were on the cars and the engine was making a loud exhaust, and that the bell was ringing; that what was being done on that day was just what was usually done, and in the usual and customary manner; that the brakemen rode from wherever they happened to be; that while in the tunnel they carried lanterns; that on this occasion the dense smoke prevented a lantern being seen but a few feet; that there was a safe place in which to walk by the sides of the track, which could have been used, and was in fact used by one of the witnesses, while others took chances; that no lights are used on engines

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or cars passing through the tunnel in the day-time for the purpose of giving any warning, the warning relied on being the noise made by the train. Except that he was certainly run over by the work train, how Ghee came to be struck and run over does not appear from the evidence, but is left solely to speculation or conjecture.

The foregoing statement of facts appearing from the evidence are all that need be stated for an understanding of the questions upon which the case turns.

Three assignments of error to the rulings of the trial court are relied on: (1) The admission of certain evidence over the objection of the defendant; (2) the refusal of certain instructions and the giving of certain other instructions; and (3) the refusal of the court to set aside the verdict as contrary to the law and the evidence, because of misdirection of the jury, and because the damages are excessive.

The first assignment of error is that the plaintiff, Mary Jane Ghee, while upon the witness stand in her own behalf, was asked: "Does your husband own any land?" to which question the defendant objected, but the court overruled the objection and the witness was allowed to answer, her answer being: "Ten acres." The witness was then asked: "In whose name does the land stand?" An objection by the defendant to this question was overruled and the plaintiff was allowed to answer that it stood in the name of her deceased husband. Again the witness was asked: "Did your husband, at the time of his death, have any other property or estate?" An objection to this question by the defendant was overruled, and the witness was allowed to answer: "No, he had no other property."

We are of opinion that this evidence was irrelative and improper, and should have been excluded, since it was not material to any issue in the case. Such evidence was calculated to excite the sympathy of the jury, or, as stated by some of the courts, to stimulate their sympathy, and this sympathy well calculated to influence the jury not only as to the *quantum* of

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damages they should allow, but in the determination of the question whether the case upon the evidence was for the plaintiff or the defendant. The principle that such evidence is presumed to have wrongfully affected the verdict seems to be settled by the decisions of this court.

In the case of *Southern Ry. Co. v. Simmons*, 105 Va. 651, 56 S. E. 459, the action was for personal injuries received by Simmons, and the number and ages of his children was the question passed on, the trial court ruling that the evidence was admissible. This court, in its opinion by Keith, P., held that it was settled that the admission of such evidence was reversible error, citing a number of authorities. The principle controlling in that case controls this.

Among the authorities cited in the *Simmons case*, *supra*, is *Penn. R. Co. v. Roy*, 102 U. S. 451, 26 L. Ed. 141, where the opinion by Mr. Justice Harlan says: "Upon the trial below, the plaintiff was allowed, against the objection of the defendant, to make proof as to his financial condition, and to show that, after being injured, his sources of income were very limited. This evidence was obviously irrelevant. The plaintiff, in view of the pleadings and evidence, was entitled to compensation, and nothing more, for such damages as he had sustained in consequence of the injuries received. But the damages were not, in law, dependent in the slightest degree upon his condition as to wealth or poverty. It is manifest, however, from the record, that the learned judge who presided at the trial subsequently recognized the error committed in the admission of that testimony. After charging the jury that the measure of plaintiff's damages was the pecuniary loss sustained by him in consequence of the injuries received, and after stating the rule by which such loss should be ascertained, the court proceeded: 'But the jury should not take into consideration any evidence touching the plaintiff's pecuniary condition at the time he received the injury, because it is wholly immaterial how much a man may have accumulated up to the time he is injured; the

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real question being, how much his ability to earn money in the future has been impaired.' "

Further on, the opinion in that case says: "There was, however, an error committed upon the trial, to which exception was duly taken, but which does not seem to have been remedied by any portion of the charge appearing in the bill of exception. The plaintiff was permitted, against the objection of the defendant, to give the number and ages of his children; a son ten years of age and three daughters of the ages, respectively, of fourteen, seventeen and twenty-one. This evidence does not appear to have been withdrawn from the consideration of the jury. It certainly had no legitimate bearing upon any issue in the case. The manifest object of its introduction was to inform the jury that the plaintiff had infant children dependent upon him for support, and, consequently, that his injuries involved the comfort of his family. This proof, in connection with the impairment of his ability to earn money, was well calculated to arouse the sympathies of the jury, and to enhance the damages beyond the amount which the law permitted—that is, beyond what was, under all the circumstances, a fair and just compensation to the person suing for the injuries received by him. How far the assessment of damages was controlled by this evidence as to the plaintiff's family it is impossible to determine with absolute certainty, but the reasonable presumption is that it had some influence upon the verdict."

In the case before us there was no attempt on the part of the court to withdraw from the jury the improper evidence as to the financial condition of plaintiff's intestate, which in fact was nothing more or less than to inform the jury as to the financial condition of his widow, the plaintiff, and it cannot be said on the whole record that this error was harmless; but it is to be presumed to have wrongfully affected the verdict.

We find nothing in *Noel's Case*, 32 Gratt. 394, and the cases there cited, relied on by the plaintiff, that questions the princi-

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ple enunciated in the case of *Southern Ry. Co. v. Simmons*, *supra*, and the authorities there cited.

Coming to the second assignment of error, relating to the instructions given and refused by the court: Instruction "D," given for the plaintiff over the objection of defendant, is as follows: "The court instructs the jury that it was the duty of the defendant company to use reasonable precautions for the safety of its employees, and that the more dangerous the place in which said company placed its employees to work, the greater the duty it owed them, and the greater should be the precautions taken for their safety, and if the jury believe from the evidence that the plaintiff's decedent came to his death on account of the negligence on the part of the defendant's employees in not taking proper precautions for his safety, as charged in the declaration, and that plaintiff's decedent himself was free from fault or negligence on his part, then the jury should find for the plaintiff."

The negligence charged in the declaration is (1) that no warning was given of the approach of the material train; (2) that no light was exhibited on the front end of the front car; and (3) that no lookout was stationed on the front end of the front car to warn employees of the approach of the material train. Reading instruction "D" in the light of the negligence charged in the declaration and the evidence given at the trial, it ignores the duty that rested upon the decedent to exercise, under the circumstances narrated, a higher degree of care for his own safety than under ordinary conditions attending such work, and for that reason, as well as for the want of evidence to support it, the instruction should not have been given.

Instruction "E," given for the plaintiff over the objection of the defendant, told the jury that "One may not by his own negligence, or want of proper care, place another in a perilous situation, and when sued for injuries resulting therefrom put the burden on the plaintiff of showing that he acted

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with reasonable care. Persons in great peril are not required to exercise the presence of mind required of prudent men under ordinary circumstances, but before this rule of law has any application in a given case the evidence must satisfy the jury that the defendant's negligence, or want of proper care, placed the person in a given perilous position, and the jury must be satisfied in addition that the position was actually perilous."

This instruction was intended to apply to the facts which the evidence in this case tended to prove, the doctrine of *res ipsa loquitur*; and we fail to find in the evidence any fact testified to going to show that the plaintiff's decedent ever knew he was in peril, or any act of his under stress of peril. The evidence fails to show that the defendant put Ghee in a perilous situation, and the only situation which the evidence shows is that the defendant placed Ghee along with others to work in a dark tunnel through which trains were likely to pass at any time. This instruction was well calculated to lead the jury to infer that the defendant, having put Ghee in this situation, he was not required to exercise presence of mind required of prudent men under ordinary circumstances. It was a work which Ghee had undertaken to do and had been doing, and it would seem clear that the tunnel filled with smoke from passing trains, and the work being done at the time of the accident was ordinary, as regards the relation of these parties to each other, and the one was as much required to exercise care commensurate with the danger of the situation as the other; so that prudence required Ghee to exercise greater care than in ordinary circumstances. An instruction given where there is no evidence which either proves or tends to prove that the injured party was placed in a position of peril by an act of commission or of omission on the part of the party charged with negligently causing the injury is clearly erroneous. *N. & W. Ry. Co. v. Stegall*, 107 Va. 231, 57 S. E. 657.

Instruction "G," given over the objection of the defendant, told the jury that "to charge George Ghee with negligence in



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this case, and to charge him with notice of his danger, the danger must have been plain and clear, so that if he did not see or apprehend it he must have been necessarily in fault."

This instruction is manifestly wrong. Ghee may have been guilty of negligence and at the same time the danger may not have been so plain and clear that he was necessarily at fault in not apprehending it; yet the jury were told that he could only be charged with negligence when the danger was so plain that he was necessarily in fault in not apprehending it. The instruction, to say the least of it, is confusing, since negligence may be independent of danger. The giving of this instruction was error.

Instruction "H," given over the objection of the defendant, relates to the damages which the jury might allow, if they found by their verdict that plaintiff's intestate came to his death by reason of the negligence of the defendant. We are unable to see the force of the objection urged to this instruction on behalf of defendant, and can see no reason for believing that it misled the jury.

Coming to the instructions asked for by the defendant and refused or modified by the court: Instruction "A" told the jury that the burden was on the plaintiff to show that her decedent was killed by the negligence of the defendant, and it being left to conjecture in this case how the plaintiff's decedent came to be run over, they must find for the defendant.

In a modified instruction "I" the court told the jury that if they believed from the evidence "that the whistle was sounded as the train went into the tunnel, and that the bell was ringing, and that the engine pushing the cars was using steam and making the noise of the exhaust, and that these were the usual and customary warnings, *and were in themselves reasonable precautions under all the circumstances and facts of this case to be taken for the safety of employees working in the tunnel,* then no negligence can be imputed to the defendant company, and they must find for the defendant."

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The objection made to this instruction, as given by the court, appears in the italicised words. We do not think that the court erred in giving this instruction, or in refusing to give instruction "A."

Instruction "B" told the jury that "if they believe from the evidence that the whistle was sounded as the train went into the tunnel, and that the bell was ringing, and that the engine pushing the cars was using steam, making the noise of the exhaust, and that these were the usual and customary warnings, no negligence can be imputed to the defendant, and they must find for the defendant."

The point of this instruction is covered by instruction "I" just quoted, and instruction "J," given by the court, instruction "J" being as follows: "The court instructs the jury that the burden of proof is on the plaintiff to show by a fair preponderance of the evidence that her decedent was killed by the negligence of the defendant, and if upon the whole evidence, direct and circumstantial, the jury are left to merely conjecture as to how the decedent came to be run over, they must find for the defendant. Negligence on part of the defendant must be proved by affirmative evidence, either positive or circumstantial, which must show more than a probability of the negligent act. A verdict cannot be founded on mere conjecture. There must be affirmative and preponderating proof of such negligence."

We are of opinion that instructions "I" and "J" sufficiently cover the point intended to be submitted by the defendant's instructions "A" and "B," and that the refusal to give the latter as asked for was not error.

Instruction "C" told the jury that "where an employee has two ways of performing an act in the course of his employment, the one safe and the other dangerous, he owes a positive duty to his employer to pursue the safe method, and any departure from the path of safety will prevent his recovery if he is injured; and if the jury believe from the evidence in this case

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that the plaintiff's intestate could have gone to either the north or the south side of the tracks and there been safe from passing trains, or on the track upon which the freight train had passed, but that he did not do so, but remained upon the track upon which he was killed, and that there was danger in that position from any train passing upon said track, they must find for the defendant."

The court modified this instruction by inserting in the last line, between the word "track" and the word "they," the words "and that a reasonably prudent person, under the facts and circumstances of this case, would and should have done so."

We are unable to see the force of the objection to this modification of the instruction, and, therefore, do not consider that the court erred in so modifying it.

The remaining assignment of error relates to the refusal of the court to set aside the verdict as contrary to the law and the evidence, and to the damages allowed by the jury as being excessive. The latter part of this assignment, relating to the damages allowed by the jury, was not insisted on in this court, and as the judgment has to be reversed for the errors pointed out and the cause remanded for a new trial, we deem it inexpedient to discuss the evidence given at the last trial.

The judgment will be reversed, and the cause remanded for a new trial to be had in accordance with this opinion.

*Reversed.*

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**Syllabus.**

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**Richmond.****CITY OF DANVILLE v. THORNTON.**

January 13, 1910.

Absent, Buchanan, J

1. **ELECTRICITY—Uninsulated Wires—Injury to Third Persons.**—It is the duty of a company maintaining wires carrying a high voltage of electricity to keep them perfectly insulated at places where others have the right to go for work, business or pleasure, and to exercise the utmost care to keep them safe at such places; and the fact that it is expensive or inconvenient to so insulate them is immaterial. The relation of master and servant need not exist between the company and the party.
2. **ELECTRICITY—Contact With Wires—Contributory Negligence.**—One who, in the course of his employment, is brought into close proximity with electrical wires, is not guilty of contributory negligence by coming in contact therewith, unless done unnecessarily, or without proper precautions for his safety. And when the wires, if properly insulated, would not be a source of danger, such person is only bound to look for patent defects, and not for latent defects. A person who touches an electric wire, from which the insulation is worn off, if he does it in ignorance of the nature and condition of the wire, is not negligent.
3. **PLEADING—Contributory Negligence of Plaintiff.**—In an action to recover for personal injuries, it is not necessary in this State for the plaintiff to negative his own contributory negligence in his declaration.
4. **INSTRUCTIONS—Different Theories—How Presented.**—It is not error to give an instruction which states only the plaintiff's theory of a case, where other instructions given for the defendant fully state his theory, and the jury are told that the instructions given in the case are the instructions of the court, and must all be read together.
5. **APPEAL AND ERROR—Disputed Facts—Verdicts.**—A plaintiff in error stands as a demurrant to the evidence, and where the questions of fact involved are so seriously controverted that reasonable men might honestly differ in their conclusions, the verdict of the jury must be upheld.

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**Statement.**

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Error to a judgment of the Corporation Court of the city of Danville in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

*Affirmed.*

The following instructions were given by the court:

*Plaintiff's Instructions.*

No. 1. "The court instructs the jury that if they believe from the evidence that on June 23, 1908, the defendant maintained an electric plant for lighting its streets, and for the purpose of furnishing electricity for private lighting and motive power, with its wires strung upon poles along Craghead street, and other streets, carrying dangerous currents of electricity; that the Danville Railway and Electric Company, by consent of defendant, so planted its poles along said Craghead street that they projected upward among the wires of defendant, dangerously charged with electricity as aforesaid, and that said defendant city required the poles of the said street railway company, projecting upward among its own dangerous wires as aforesaid, to be painted, then it was the duty of the defendant to use care commensurate with the danger and consistent with the practical conduct of its business, to maintain and inspect its said wires in order to keep them properly insulated at the top of the pole of the said Danville Railway and Electric Company on the west side of Craghead street, and opposite the freight depot of the Southern Railway Company, so as to protect such persons as might lawfully go upon said pole for the purpose of painting it, and who might while there accidentally come in contact with said wires, from injury by the currents of electricity on the said wires, and it is for the jury to decide, from the evidence, whether defendant city performed its duty in this respect, and whether, if it had used such care in maintaining and inspecting its wires at the top of the

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said poles where plaintiff was injured, the alleged defects of said wires could have been discovered and remedied.”

No. 2. “The court instructs the jury that in the erection or construction of its poles and wires carrying dangerous currents of electricity, it was the duty of defendant to use such care as was commensurate with the danger in so locating its poles and in so stringing its wires, that contact with said dangerous wires might be avoided so far as could be reasonably anticipated, and so far as would be consistent with the practical conduct of its business of lighting its streets and furnishing electricity for other purposes, but this instruction is to be read in connection with the other instructions.”

*Defendant's Instructions.*

No. 1. “The court instructs the jury:

“That the burden rests upon the plaintiff to show by a preponderance of evidence every fact necessary to hold the defendant city liable for the injury complained of. Such evidence must show more than the probability of a negligent act. A verdict cannot be found on mere conjecture, but there must be affirmative and preponderating proof that the negligence of the defendant was the proximate cause of the injury of which the plaintiff complains, or that its negligence concurred with that of the Danville Railway and Electric Company in producing the injury.”

No. 3. “The court further instructs the jury:

“That the burden is on the plaintiff of proving a want of diligence and care commensurate with the danger of operating and maintaining wires for the purpose of carrying electric currents to furnish heat and light on the part of the defendant city, and on the defendant city to prove want of ordinary care on the part of the plaintiff contributing to his injury, but if plaintiff's evidence discloses his own contributory negligence, or it may be inferred from all the circumstances of the case, it bars his recovery, no matter where the burden rests.”

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No. 4. "The court further instructs the jury:

"That if they believe from the evidence that the plaintiff was of sufficient intelligence, capacity and experience to have seen or detected any defects or improper insulation in the wires of the defendant city, at or near the pole, where he is alleged to have been hurt, by the exercise of ordinary care, and that by the exercise of such ordinary care and diligence he could have avoided the accident complained of under the circumstances of this case, then they must find for the defendant."

No. 5. "The court instructs the jury:

"That if they believe from the evidence that the plaintiff, Elmer T. Thornton, was of sufficient intelligence, capacity and experience to know the probable danger of coming in contact, while in a state of profuse perspiration, with the wires upon or near the pole on Craghead street in Danville, upon which he was alleged to have been at the time of his alleged injury, and if they further believe from the evidence that he was of sufficient intelligence, capacity and experience to know his duty to avoid them for his protection, and that he negligently failed to avoid them, then his contributory negligence will bar his recovery, and they must find for the defendant."

No. 6. "The court further instructs the jury:

"That if they believe from the evidence that the plaintiff, Thornton, on the day of the alleged accident, climbed the said pole of the Danville Railway and Electric Company, and voluntarily attempted to go in and among the wires of the defendant city, strung at or near the said pole, for the purpose of painting said pole, and attempted to go in and among said wires to a greater extent than was necessary, or if necessary so to go, failed at the time of the accident to exercise ordinary care to keep from coming in contact with said wires, and by the failure to exercise such ordinary care, came in contact with or fell upon said wires, and was thereby injured, then they are instructed that such failure to exercise ordinary care on

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his part will prevent plaintiff's recovery in this action, and they must find for the defendant."

No. 7. "The court further instructs the jury:

"That the city is not an insurer against accidents from wires erected and maintained by it upon its streets for the purpose of conveying electric currents for light and power, and in order to hold it liable for said wires or any of them being improperly insulated, or for defects in the insulation of same, it must be shown that the city had actual or constructive notice of the defects or of the imperfect insulation of same whereby the accident is alleged to have been caused, and had reasonable time to repair or guard against any accident that might reasonably be expected to result from said defect in the insulation of said wires, or from the imperfect insulation thereof, after having such notice, and, that by constructive notice is meant that the defect or imperfect insulation by which the injury is alleged to have been caused had been so open and notorious, and continued for such a length of time before the injury that the city, by its proper officers, exercising diligence and care commensurate with the danger, should have acquired knowledge of such defect. And if, therefore, the jury believe from the evidence that the city had no actual knowledge of such defect in such wires, or of the imperfect insulation thereof at or near the pole on Craghead street at which the accident to the plaintiff is alleged to have occurred, and that the defect in, or imperfect insulation of, said wires had not remained so open and notorious for a sufficient length of time as that the city, by the exercise of such diligence and care as were commensurate with the danger, should have known of their existence, and had time to repair the same or take such proper diligence and care to prevent such injury as might be expected from said defect in, or improper insulation of, said wires, then they will find for the defendant."

No. 8. "The court instructs the jury:

"That if they believe from the evidence in this case that the defendant city had purchased and strung wires all along Crag-



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head street at or near the point where the accident to the plaintiff is alleged to have occurred, of standard quality and efficiency, and that said wires were insulated according to the standard of electricians and electrical companies generally, and that at the time of the accident alleged to have happened to the plaintiff said wires were properly insulated according to the standard of effective insulation generally in use and accepted by electricians and electrical companies, and that the insulation on said wires with which said plaintiff is alleged to have come in contact is not defective and was in the condition of efficiency set by the standard adopted and used by electricians and electrical companies generally, that then the defendant city had performed the duties imposed upon it by law and they must find for the defendant, although they may further believe from the evidence that the wires of the said defendant passed at and near the said pole of the Danville Railway and Electric Company, and that the poles of the defendant city were not high enough above the pole at which the plaintiff, Thornton, was hurt, to cause the wires of the city to be above and beyond said pole, and although they may further believe from the evidence that the plaintiff, Thornton, exercised ordinary care and caution in protecting himself from contact with said wires."

No. 9. "The court further instructs the jury:

"That the defendant city is not required under the law to use any particular methods and means of insulation, nor is it required to adopt any particular standard used by any particular company or corporation manufacturing and using electricity; but if said defendant city has adopted and used the standard recognized as efficient among electricians and those manufacturing and using electricity generally, that then said defendant city has complied with the requirements of the law and they must find for the defendant, unless they believe from the evidence that one or more of its wires at or near the pole at which the accident complained of is alleged to have occurred was defective or improperly insulated, unless they further be-

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lieve from the evidence that the plaintiff, Thornton, could, by the exercise of ordinary care, have seen and avoided such defects or improper insulation in time to have avoided coming in contact with said wires, provided they also believe from the evidence that he was of sufficient intelligence, capacity and experience to understand and appreciate such defects, improper insulation or lack of insulation when seen and detected by him."

No. 10. "The court instructs the jury:

"That, although they may believe from the evidence in this case that the defendant city was guilty of negligence in the manner of maintaining its wires or of not repairing defective insulation, or of lack of insulation in its wires, at or near the pole on Craghead street, on which the accident is alleged to have occurred, and for which plaintiff claims damages in this case, yet the jury are instructed that if they believe from the evidence in the case that the plaintiff was of sufficient capacity, intelligence and experience to appreciate the danger of so doing, that said plaintiff had no right to attempt, while engaged in the painting of said pole, to go in and among said wires if, in so doing, he increased the danger of an accident by coming in contact with them, or any of them, and if from the evidence they believe that the plaintiff did attempt, while painting said pole, to go in and among said wires, and by so doing did increase the danger and chance of an accident, he cannot recover in this case, and the jury must find for the defendant, unless they may believe from the evidence that plaintiff might, consistent with his knowledge, capacity and experience, have reasonably supposed that he could have worked among said wires safely."

No. 11. "The court instructs the jury:

"That the instructions given in this case are the instructions of the court, and they must all be read together."

*Eugene Withers and E. Walton Brown*, for the plaintiff in error.

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*Julian Meade*, for the defendant in error.

WHITTLE, J., delivered the opinion of the court.

The defendant in error, Thornton, who was the plaintiff below, recovered the judgment under review against the city of Danville in an action for personal injuries.

The first assignment of error calls in question the sufficiency of the declaration, the essential allegations of which are as follows: That the defendant had permitted the Danville Railway and Electric Company to erect its poles on both sides of the streets of the city over which its lines extended, which poles were thirty feet high, and were required by a city ordinance to be kept neatly trimmed and painted; that on the west side of Craghead street the defendant erected its own poles and strung its own wires, heavily charged with electricity, at such height from the surface of the street and in such position that the wires passed along in close proximity to and on both sides of the upper part of the poles of the Danville Railway and Electric Company, touching the poles at some places, and in order to paint them it became necessary to ascend the poles and to go among and be exposed to contact with the defendant's wires over which electric currents flowed; that it was the duty of the defendant, in the construction, maintenance and operation of its system of wires, to use due and proper care to insulate the wires at such places as persons might be reasonably expected to come in contact therewith, so as to prevent injury from such contact, especially to persons engaged in painting the poles of the Danville Railway and Electric Company in obedience to the city ordinance; that the defendant did not discharge its duty in that regard, but negligently failed to properly insulate its wires, and suffered the insulation to be and remain off the wires at or very near a pole of the Danville Railway and Electric Company for the period of a month or more; by reason whereof "the plaintiff, who went to the top of the aforesaid pole . . . among

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the wires of the defendant, pursuant to the ordinance and requirement of the defendant, . . . to paint the pole as aforesaid, and while lawfully thereon, performing his duty in that respect, without any negligence on his part, came in contact with the defendant's wires, which were heavily charged with electricity, at the points where the same were insufficiently and improperly insulated, or where the insulation was off," and was greatly shocked and received the severe injuries of which he complains.

The grounds of demurrer relied on are that the declaration shows that the plaintiff was the servant of the Railway and Electric Company, and not of the defendant, between whom and it there was no privity of contract, and to whom the city owed no duty; that it cannot be even inferred that the plaintiff was authorized to go upon the pole in question, either by the city or the Railway and Electric Company; and, moreover, that the declaration shows that the plaintiff was guilty of contributory negligence.

The declaration, by fair inference, plainly shows that the plaintiff was lawfully on the pole about the business of the Railway and Electric Company, which was under obligation to keep it painted; and it is a mistaken view of the law to suppose that the action is dependent upon the existence of the relation of master and servant between the defendant and the plaintiff, or indeed that any contractual relation between the parties is essential to the maintenance of the action.

The general doctrine on the subject will be found in Joyce on Electric Law, sec. 445, where the learned authors say: "A company maintaining electrical wires, over which a high voltage of electricity is conveyed, rendering them highly dangerous to others, is under the duty of using the necessary care and prudence at places where others may have the right to go, either for work, business, or pleasure, to prevent injury. It is the duty of the company, under such conditions, to keep the wires perfectly insulated, and it must exercise the utmost care to main-

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tain them in this condition at such places. And the fact that it is very expensive or inconvenient to so insulate them will not excuse the company for failure to keep their wires perfectly insulated. So one, who in the course of his employment, is brought in close proximity to electrical wires, is not guilty of contributory negligence by coming in contact therewith, unless done unnecessarily or without proper precautions for his safety. And when the wires, if properly insulated, would not be a source of danger, such person is only obliged to look for patent defects and not for latent defects. And a person who touches an electric wire, from which the insulation is worn off, if he does it in ignorance of the nature and condition of the wire, is not negligent."

The foregoing is a correct statement of the general rule, and is sustained by the authorities cited. *Mitchell v. Raleigh Elec. Co.*, 129 N. C., 166, 39 S. E. 801, 85 Am. St. Rep. 735, 55 L. R. A. 398; *Thomas v. Wheeling E. Co.*, 54 W. Va. 395, 46 S. E. 217; *Thornbury v. City & E. G. R. Co.*, 65 W. Va. 379, 64 S. E. 358; *Clements v. Louisiana Elec. L. Co.*, 44 La. Ann. 692, 11 South. 51, 32 Am. St. 348, 16 L. R. A. 43.

Measured by that standard, the declaration states a good cause of action.

With respect to the suggestion, that the declaration does not negative the plaintiff's contributory negligence, that is not necessary under our practice. (*Interstate R. Co. v. Tyree, ante*, p. 38, 65 S. E. 500.) But if the rule were otherwise, the declaration does contain the allegation that the inquiry was inflicted "without any negligence on his part."

The second assignment of error is to the giving of plaintiff's instruction No. 1, the sole ground of objection being that it excludes from the consideration of the jury the defendant's theory of the case, and submits that of the plaintiff only.

It appears that the instructions given on behalf of the defendant cover every aspect of its case; and, finally, the jury are told that the instructions given in the case are the instructions of the court and must all be read together.

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The third and last assignment is to the action of the court in overruling the motion of the defendant to set aside the verdict of the jury as contrary to the law and the evidence. The considerations to which our attention is invited under this assignment are threefold: (a) That the evidence shows that the defendant fully discharged its duty in establishing, maintaining and operating its wires; (b) that no notice, actual or constructive, was traced to the defendant of the defects which occasioned the plaintiff's injuries; and (c) that the evidence shows that the plaintiff was guilty of contributory negligence.

Of these contentions, as a whole, it is sufficient to observe that they involve seriously controverted questions of fact, about which reasonable men might honestly differ; and where such is the case the rules applicable to a demurrer to the evidence must control and the verdict of the jury be upheld.

For these reasons the judgment is affirmed.

*Affirmed.*

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 Statement.
 

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**Richmond.**

## COMMONWEALTH v. VIRGINIA BANK AND TRUST CO.

January 13, 1910.

Absent, Buchanan, J.

1. **BANKS—Taxation—Value of Shares—Deductions—Assessed Value of Real Estate.**—In ascertaining the value of the shares of bank stock for taxation under Acts 1908, p. 325, the value of the real estate otherwise taxed, which is to be deducted from the aggregate of the bank's capital, surplus and undivided profits, is the *assessed* value of such real estate, and not its *actual* value. Any other construction would render the act of doubtful constitutionality under the provisions of section 182 of the Constitution.

Error to a judgment of the Corporation Court of the city of Norfolk on a petition to correct an erroneous assessment. Judgment for the petitioner. Commonwealth assigns error.

*Reversed.*

The opinion states the case.

Wm. A. Anderson, Attorney General, for the Commonwealth.

Loyall, Taylor & White, for the defendant in error.

Counsel for the defendant in error presented the following argument:

The single question presented in this case is whether, in assessing the stock of a bank for taxation, the *actual* value or the *assessed* value of its real estate is to be deducted from the aggregate of its capital, surplus, and undivided profits.

The facts in this case are as follows:

The capital of the Virginia Bank and Trust Company, Incorporated, on the first day of February, 1909, was \$600,000.00,

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the surplus was \$90,000.00, and the undivided profits were \$15,541.72; making a total of \$705,541.72.

Included in the capital, surplus and undivided profits was the cost of the land and the banking building thereon, amounting to \$138,133.65, and this was the actual value thereof. In other words, in making up its capital, surplus and undivided profits to the sum of \$705,541.72, its real estate, consisting of its bank building and the land on which it is situated, was placed at its value of \$138,133.65.

This real estate was assessed at \$60,000.00.

The contention of the Commonwealth is that \$60,000.00, the assessed value of said real estate, only, should be deducted from the total of its capital, surplus and undivided profits of \$705,541.72.

While the contention of the bank is that the actual value of said real estate, the value at which it was included in the capital, surplus and undivided profits, viz.: \$138,133.65, should be deducted therefrom.

By the acts of 1902-3-4, page 163, it is provided as follows:

“From the total market value of the shares of stock of any such bank, . . . there shall be deducted the *assessed value* of its real estate otherwise taxed in this State, and the value of each share of stock shall be its proportion of the remainder: provided, that the market value of said stock shall be estimated at a sum not less than the aggregate of the capital, surplus and undivided profits of each bank, . . . as shown by its last published statement prior to the first of February of each year, after deducting from such aggregate the value of its real estate otherwise taxed in this State.”

By the acts of 1908, page 325, it is provided as follows: “From the total value of the shares of stock of any such bank . . . which shall be ascertained by adding together its capital, surplus and undivided profits, there shall be deducted *the value* of its real estate otherwise taxed in this State, and the actual value of each share of stock shall be its proportion of the remainder.”



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fectly clear that the object of the amendment was First, to fix the value of the stock, not by an estimate might be its market value, but by adding the capital, and undivided profits; and, second, to allow a deduction aggregate, so ascertained, not of the assessed value of the stock, but of the actual value thereof.

Legislature, in eliminating the word "assessed," must be understood that, in place of deducting the assessed value of the stock, there had theretofore been the rule because of the use of the word "assessed" in the previous act, the actual value of the land was to be deducted. No other conclusion can be drawn from the language in the act.

It would be the intention of the legislature, and certainly it is so construed, the court is, of course, bound thereby. If the result were not reasonable. But that it is reasonable and sound is evident at once upon a consideration of the situation.

Since the bank owns real estate, the stock represents two kinds of property: real property and personal property. The real property is assessed in the same way as the real property of individuals and other corporations, and when taxes have been levied on the assessed value, the stock, to the extent to which it represents real property, has borne its part of the burden of the tax.

It is only fair, then, that the stock should be taxed, not on its assessed value, but only to the extent to which it represents personal property.

This is determined, of course, by deducting the assessed value of the real estate from the total actual value of the stock, whether real and personal, and not by deducting merely the assessed value of the real estate.

For a concrete illustration, take the case at bar; the total value of the stock, taking personal and real property together, is \$1,380,000 in round figures. Of this value, \$138,000 in round figures represents real assets already taxed. In other words, 10 per cent of the property represented by the stock has already been taxed and the \$1,242,000 remaining only should yet be taxed. As proposed by the Auditor of Public Accounts, in-

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stead of taxing the remaining 567-705ths of the total, he proposes to deduct only \$60,000, the assessed value of the real estate, and to tax 645-705ths, in which case more than the whole would be taxed, which would be clearly unjust and unfair.

It is evident from the express terms of the act that taxation on the stock of a bank is in lieu of, and not in addition to, a tax on its capital. It is further manifest that the tax is placed on the stock and not on the capital, because the capital of the national banks cannot be taxed by the State, while the stock can be. *Owensboro National Bank v. Owensboro*, 173 U. S. 668.

The object, then, of taxing the stock of banks, and not the capital, was to compel the national banks to bear their portion of the burden of taxation as well as the State banks. The object was not to impose a larger burden by taxing the stock than would result from taxing the capital.

If a State bank were taxed upon its capital and it owned real estate as a part of that capital, it would pay, in addition to the tax on the assessed value of its real estate, only on the value of its personal property. In the case at bar the Virginia Bank and Trust Company owns notes, bonds and securities of the value of \$567,408.07 and owns real estate of the value of \$138,133.65. If it pays the taxes on the assessed value of its real estate and taxes on the value of its personal property, it has borne its portion of equal and uniform taxation.

If, on the other hand, it pays taxes on the value of its personal property, on the assessed value of its real estate, and also on the difference between the assessed value of its real estate and its actual value, it is evident at once that it has paid more taxes on its real estate than the owners of other real estate, who only pay on the assessed value.

We don't mean to say that the legislature could not tax the capital and also tax the stock at its market value. It could. But what we do mean to say is this: where the legislature has

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placed a tax on stock, in lieu of a tax on capital, it was reasonable, fair and equitable that it should allow the actual value of the real estate, otherwise assessed and taxed, to be deducted from the total assets, real and personal, in determining the value of the stock for taxation.

We repeat, therefore, that the legislature, in changing the language of the act in 1908, must have meant that the actual value of the real estate, and not merely its assessed value, was to be deducted from the actual value of the real estate and personal property called capital, surplus and undivided profits, and that such a change was in harmony with the principle of equal and uniform taxation.

It is stated in the petition for a writ of error that the construction contended for by the Commonwealth has been accepted and followed by every bank in the State except the defendant in error.

We hardly think this is an accurate statement. It may be that all the other banks owning real estate have not protested against the deduction of the assessed value thereof made by the commissioner of the revenue, but this hardly justifies the conclusion that such banks have accepted and followed the construction of the law contended for by the Commonwealth. The failure to protest may be due to several causes:

1. Many banks own no real estate and are not affected by the law.

2. Many of the banks may not have been aware of the amendment to the law, which was not effective until the assessment of 1909.

3. And even where banks own real estate, if such real estate is placed in their statements, in making up the capital, surplus and undivided profits, at an amount that is not greater than the assessed value of said real estate, such banks are not interested in the point raised in these proceedings. For instance, take a bank which bought its banking site many years ago in Norfolk

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and placed the value of said real estate in its statements at the cost at the time it was purchased. That real estate has since vastly increased in value, but the bank has not, in making up its capital, surplus and undivided profits, increased the valuation of the real estate in such statement. The assessment, however, has been increased from time to time, and is now equal to, or in excess of, the value at which the real estate is placed in the banking statement. We know of many banks to which this illustration is applicable. It is evident that such a bank would not be benefited by an appeal to the principle involved in this case. It could not deduct, as representing its real estate, a greater value from the aggregate of its capital, surplus and undivided profits than the amount at which it placed its real estate in such statement.

The true and fair principle is evident at once. A bank should be allowed to deduct, before its stock is assessed, the value at which its real estate has been included in making up the aggregate of its capital, surplus and undivided profits. The value thus deducted represents real estate which is otherwise taxed.

*Value of Real Estate Otherwise Taxed.*

The argument in the petition for a writ of error seems to be based mainly on the idea that the words "otherwise taxed" in the clause "value of the real estate otherwise taxed in this State" refers to and modifies the word "value," and not the words "real estate." We respectfully submit that such a contention cannot be upheld. The proper, logical and grammatical construction of that clause must be that the expression "otherwise taxed" has reference to the real estate and not to the value of the real estate. Values are not taxed—property is taxed, and such property is assessed in accordance with its value—but values are not taxed.

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*Constitutional Provision.*

In the petition for a writ of error the further argument is made that section 182 of the Constitution controls this case. This section reads as follows:

“Until otherwise prescribed by law the shares of stock issued by trust or security companies chartered by this State, and by incorporated banks, shall be taxed in the same manner in which the shares of stock issued by incorporated banks were taxed by the law in force January 1, 1902; but from the total assessed value of the shares of stock of any such company or bank there shall be deducted the assessed value of its real estate otherwise taxed in this State, and the value of each share of stock shall be its proportion of the remainder.”

It is perfectly evident that the Constitution merely fixed the method of taxing bank stock “until otherwise prescribed by law.” In other words, the Constitution simply legislated upon the method of taxing bank stock until a change should be made in that method by the legislature. That change has now been made and the constitutional provision has no application.

Constitutions are construed strictly and inhibitions on the powers of the legislature are not extended beyond what is clearly required by the language of the Constitution.

It would be rather remarkable to say that a constitutional provision, consisting of one sentence, which begins with the words “until otherwise prescribed by law,” controls and prohibits what may afterwards be “prescribed by law.”

KEITH, P., delivered the opinion of the court.

The Virginia Bank and Trust Company presented its petition to the Corporation Court of the city of Norfolk, in which it shows, that on February 1, 1909, the capital stock of the bank was \$600,000, the surplus \$90,000, and the undivided profits \$15,541.72, making the total of the capital,

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surplus and undivided profits \$705,541.72; that the bank was at that time and still is the owner of a lot of land with the bank building thereon, in the city of Norfolk; that the lot and building had cost the bank the sum of \$138,133.65, which sum represents the true value of said property on February 1, 1909, and that this building was placed in the assets of the bank at the figure \$138,133.65 in making up the total of its capital, surplus and undivided profits of \$705,541.72; that the commissioner of the revenue of the city of Norfolk, instead of deducting from the total of the capital, surplus and undivided profits the value of said real estate, namely, \$138,133.65, in order to determine the value of the shares of stock of said bank for taxation, deducted from the total of the capital, surplus and undivided profits \$60,000, being the value at which said real estate was assessed for the purpose of taxation, the result of which was that the stock of the bank was assessed for the year 1909 at \$642,000, when it should have been assessed at only \$567,408; and that in consequence of said erroneous assessment made by the commissioner of the revenue the bank has paid to the State of Virginia, and is entitled to have refunded to it by reason of said erroneous assessment, the sum of \$260.72. The petitioner, therefore, prays the court to correct said erroneous assessment and direct the repayment to petitioner of the sum of \$260.72, in accordance with the facts as above set forth.

The corporation court granted the prayer of the petitioner held that it had been erroneously charged with the sum of \$260.72, and directed that that sum should be refunded to it. Upon the petition of Morton Marye, Auditor of Public Accounts, a writ of error was awarded to that judgment.

The Acts of 1908, p. 325, provide that the value of the shares of stock of the defendant in error and other like corporations shall be ascertained by adding together its capital, surplus, and undivided profits, and that the actual value of each share of stock shall be its proportion of the aggregate amount. There can be no doubt that in this respect the law was complied with.

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The controversy arises over the amount to be deducted, the statute saying, "there shall be deducted the value of its real estate otherwise taxed in this State"; the contention upon the part of the Commonwealth being that this phrase has reference to the value at which the real estate is assessed for taxation, which in this case is \$60,000, while the defendant in error contends that the word "value" refers to the actual value of the real estate otherwise taxed, and that there should be deducted from the aggregate of the capital, surplus and undivided profits the sum of \$138,133.65, which is the actual value of the real estate.

In the Acts of 1902-3-4, p. 163, it is provided that "From the total market value of the shares of stock of any such bank . . . there shall be deducted the assessed value of its real estate otherwise taxed in this State, and the value of each share of stock shall be its proportion of the remainder; provided, that the market value of said stock shall be estimated at a sum not less than the aggregate of the capital, surplus, and undivided profits of each such bank . . . as shown by its last published statement prior to the first of February of each year, after deducting from such aggregate the value of its real estate otherwise taxed in this State."

That section was amended by the Acts of 1908, p. 325, so as to read as follows: "From the total value of the shares of stock of any such bank . . . which shall be ascertained by adding together its capital, surplus, and undivided profits, there shall be deducted the value of its real estate otherwise taxed in this State, and the actual value of each share of stock shall be its proportion of the remainder."

It will be observed that the first act is amended in two particulars: In the first act the *market value* of the shares of stock are the subject of taxation, with a proviso that the market value shall be estimated at a sum not less than the aggregate of the capital, surplus and undivided profits of such bank, as shown by its last published statement prior to the first of February of each year, after deducting from such aggregate the value of its

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real estate otherwise taxed in this State; while in the act of 1908 the market value is not referred to, but the statute fixes its own method of ascertaining the value for taxation of the shares of stock in such institutions, and then provides that there shall be deducted *the value* of its real estate otherwise taxed in this State. The second act is not as explicit as the first, which leaves no room to doubt that the sum to be deducted is the *assessed* value of the real estate, for it is expressly declared that "from the total market value of the shares of stock of any such bank . . . there shall be deducted the assessed value of its real estate"; but it will be observed that at the conclusion of the proviso in the former act, in declaring what sum shall be taken from the aggregate of the capital, surplus and undivided profits, the phrase is used "after deducting from such aggregate the *value* of its real estate otherwise taxed in this State." It cannot be supposed that the legislature intended to deduct the *assessed* value of the real estate from the market value of the shares of stock where the market value was the subject of taxation in the first clause, and deduct a different amount, to-wit, the actual value, in the event the value of the stock for taxation should come to be estimated in accordance with the terms of the proviso or concluding clause of the section.

Defendant in error contends that the words "otherwise taxed" in the statute have reference to the real estate, and not to the value of the real estate. We think they refer to and modify the entire phrase, "the value of its real estate otherwise taxed in this State," for it is values and not real estate which after all is the subject of taxation.

We are also of opinion that the provision of the Constitution—section 182—has a decided bearing upon the subject. It reads as follows: "Until otherwise prescribed by law, the shares of stock issued by trust or security companies chartered by this State, and by incorporated banks, shall be taxed in the same manner in which the shares of stock issued by incorporated banks were taxed by the law in force January 1, 1902; but from the



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total assessed value of the shares of stock of any such company or bank there shall be deducted the assessed value of its real estate otherwise taxed in this State, and the value of each share of stock shall be its proportion of the remainder."

The first branch of this section, which provides that the law then in existence shall continue in force until otherwise prescribed by law, implies the power in the legislature to change the law. But it is also plain that the concluding clause of that section prescribes a limitation upon the power of the legislature with respect to the subject, and in effect declares that however the law may be altered and amended, whatever changes the legislature may see fit to prescribe, it shall always be provided that from the total assessed value of the shares of stock of any such company or bank there shall be deducted the *assessed* value of its real estate otherwise taxed in this State, and the value of each share of stock shall be its proportion of the remainder.

We reach the conclusion that, in addition to what we have already said, and in view of the terms of section 182 of the Constitution, the construction contended for by defendant in error would render the act of doubtful constitutionality; and upon the whole case we are of opinion that the judgment of the corporation court should be reversed.

*Reversed.*

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**Syllabus.**

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**Richmond.****DANIEL AND OTHERS v. LIPSCOMB AND OTHERS.**

January 13, 1910.

Absent, Buchanan, J.

1. **WILLS—Child—Descendants—Defeasible Fee—Case in Judgment.**—A testatrix bequeathed property to her two grandsons, A and B, to be equally divided between them, “and if either of my grandsons should die leaving no child or descendants surviving him, the share he receives under this will is to go to his surviving brother, and if both of my grandsons die, leaving no child or descendants surviving them, then the whole of what is herein given shall be equally divided between” my children. A died without issue. B is still living and has living children.

*Held:* The words “child” and “descendants,” in the connection here used, are not words of purchase, creating an estate in the class designated, but are words of limitation, which serve to limit or describe the estate given. A and B each took defeasible fees. Upon the death of A without issue, the estate given to him passed to B, subject to the same condition. In no event can the children of B take anything under the will of the testatrix. If they survive their father his defeasible fee is converted into a fee simple, which, if undisposed of, they will take by *inheritance from their father*, but *not by purchaser under the will of the testatrix*. If, however, B is not survived by any child or descendant, the estate will pass under the ulterior limitation to the children of the testatrix. *Pettyjohn v. Woodruff*, 77 Va. 507, criticised.

2. **WILLS—“Dying Without Heirs”—Code, sec. 2422—Perpetuities.**—The purpose of the statute (Code, sec. 2422) construing the phrase “dying without heirs” and similar expressions is to effectuate the intention of the testator by rendering valid a limitation which would have been otherwise invalid as violative of the rule against perpetuities. Since January 1, 1820, words which had previously been construed to mean an indefinite failure of issue are now construed to mean a *definite* failure of issue, and the limitations founded thereon are no longer void for remoteness.

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Error from a decree of the Circuit Court of Cumberland county. Decree for defendants. Complainants appeal.

*Affirmed.*

The opinion states the case.

*Scott, Buchanan & Cardwell, E. W. Hubbard and William Lancaster, for the appellants.*

*A. B. Armstrong, A. S. Hester, J. Taylor Thompson and Richard B. Davis, for the appellees.*

WHITTLE, J., delivered the opinion of the court.

The object of this suit is to construe certain clauses in the wills of Elizabeth W. Spencer and George W. Daniel, and to set up a remainder, by way of executory limitation, in the children of William Daniel in an undivided moiety of two tracts of land situated in Cumberland county, Virginia, known as the "son" and "Springfield" tracts.

The circuit court held that the children of William Daniel have no interest in the moiety of the lands devised to John S. Daniel by the will of his father, George W. Daniel, construed either alone or read in connection with the will of Elizabeth W. Spencer, which is referred to and made a part of George W. Daniel's will, and dismissed the bill on demurrer. From that decree this appeal was allowed.

Mrs. Spencer's will bears date June 6, 1850, and directs that the money arising from the sale of her slaves, and the residue of her estate not otherwise disposed of, shall be divided into equal parts. One of these parts she bequeathed to her sons, John S. and William Daniel, to be equally divided between them; and the will declares that "if either of my sons should die leaving no child or descendants surviving, the share he receives under this will is to go to his surviv-

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ing brother; and if both of my grandsons die leaving no child or descendants surviving them, then the whole of what is herein given them shall be divided equally between my son, James L. Spencer, and my daughters, Anna Louisa Sims and Elizabeth Price McChesney . . . .”

The shares of John S. and William Daniel, amounting to \$5,000, were collected by their father, George W. Daniel, from the executor of Mrs. Spencer, without authority, and invested by him, in his own name, in a farm called the “Buffalo” tract.

By will dated February 11, 1869, George W. Daniel devised the “Gibson” tract and the “Springfield” tract, to be divided “equally between Dr. John S. Daniel subject to said limitations and restrictions as the will of E. W. Spencer requires; the other half I give in trust to the children of William Daniel, such as he has now or may have lawfully; he is to have no interest in the property or management in any way or by any pretext whatever. The children are to enjoy the property jointly and equally.”

John S. Daniel died unmarried and without “child or descendants.” William Daniel and his children are still living.

The sole question for our determination is what, if any, estate have the children of William Daniel in the subject matter of litigation, the undivided moiety in the Cumberland county lands devised primarily to John S. Daniel?

It will be observed that there is no express declaration of purpose on the part of the testator that the children of William Daniel are to take any interest whatever in the moiety devised to their uncle, John S. Daniel. On the contrary, the devise to them is clearly restricted to the remaining moiety. Moreover, the will declares, that the moiety given, in the first instance, to the uncle is subject to the limitations and restrictions contained in the will of Mrs. Spencer—that is to say, “if either of my grandsons should die leaving no child or descendants surviving him, the share he receives under this will is to go to his surviving brother; and if both of my grandsons die leaving no child

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or descendants surviving them, then the whole of what is given them shall be divided equally between" certain of testatrix's children.

Construing both wills together, there would seem to be no difficulty in classifying the devise of the moiety of the Cumberland lands to John S. Daniel as a *defeasible fee*, a vested estate, but one subject to be divested by his dying without leaving a child or descendant surviving him.

In 2 Min. Inst. (3d ed.) 426, 427, the learned author observes: "The possibility of limiting the whole fee by means of an *executory limitation*, and afterwards, upon some contingency, *qualifying that disposition*, and giving the estate to some other person, arises out of the fact that the several statutes (of uses, wills and grants), which give birth and validity to such limitations, dispense with *livery of seisin* to create a freehold, and thereby dispense with the corresponding *notoriety of entry* to determine it. (*Ante*, p. 233, 3 k; 2 Th. Co. Lit. 87, n. [L. 2], 768, Butler's Note II.) Thus, if a devise were made to A and his heirs, and in case A should die, leaving no issue at his death, to Z and his heirs, the limitation to Z and his heirs would be valid as an *executory limitation*, and would give to Z the fee, of which the event designated (*viz.*, his *death without issue*), had divested A." 1 Minor on Real Prop., sec. 555.

In *Elys v. Wynne*, 22 Gratt. 224, the testator gave his daughter, D, a designated tract of land, "to her and the heirs of her body; but should D die without heirs, . . . my wish is that said land shall return to my other heirs . . ." Held: "(1) D took under the statute a fee simple estate in the land *defeasible* upon her dying without a child living at her death. (2) The limitation over to testator's other heirs is valid, and took effect upon the death of D without a child living at her death."

*Randolph v. Wright*, 81 Va. 608, the testatrix gave her *ty* to her two sons, P and E, and provided that if either e without a will or lawful issue, the surviving son should

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take his portion. E died without issue and intestate. Held: "E took a *defeasible* fee simple, coupled with a power of appointment by *will*, with remainder over to P, and that his *defeasible* fee simple estate having been defeated by his death, without issue living at his death, and he having failed to exercise his power of appointment by *will*, the remainder to P is good."

The same will was before the court a second time in *Johnson's Admr. v. Citizen's Bank of Richmond*, 83 Va. 63, and it was again held that each son took a *defeasible* fee in the land devised to him, coupled with a power of appointment by will, with remainder over to the survivor.

The devise in *Snyder v. Grandstaff*, 96 Va. 473, 31 S. E. 647, 70 Am. St. Rep. 863, is also identical in legal effect with the disposition in Elizabeth W. Spencer's will, and the court in that case, at page 482, denominates the estate in the first taker a *defeasible fee*.

So, in *French v. Logan*, 108 Va. 67, 60 S. E. 622, if there had been an ulterior limitation over upon the death of the life tenant without issue, the necessary effect would have been to make what was held in that case to be a fee simple in the issue a *defeasible fee*. See also *Waring v. Waring*, 96 Va. 641, 32 S. E. 150.

In Virginia, since 1787, the word "heirs" is not necessary to create an estate of inheritance; the statute providing that "where any real estate is conveyed, devised, or granted to any person without any words of limitation, such conveyance, devise or grant shall be construed to pass the fee simple, or other the whole estate or interest which the grantor or his testator has power to dispose of in such real estate, unless a contrary intention shall appear by the conveyance, will or grant." Va. Code, 1904, sec. 2420.

Hence, in the instant case, the devise to John S. Daniel, standing alone, would have invested him with a fee simple estate in the moiety of lands devised; and the effect of the qual-

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ifying language, "if he should die leaving no child or descendants surviving him," is to convert what would otherwise have been a fee simple into a defeasible fee. He did die leaving no child or descendants surviving him, and by the terms of the devise the estate passed to his surviving brother, William Daniel, subject to the same condition—that is, if William Daniel should die leaving no child or descendants surviving him, the estate should pass to the children of the testatrix, Elizabeth W. Spencer.

The words "child" and "descendants," in the connection in which they occur, are not words of purchase, creating an estate in the class designated, but are words of limitation, which serve to limit or describe the estate given. 1 Min. Real Prop., sec. 152, p. 192, and authorities cited in note. In no event, therefore, can the children of William Daniel take as purchasers under the wills. Should they survive their father, the status of his estate, which until the happening of that event was a *defeasible fee*, is established as a fee simple, which, if undisposed of, the children would take *by inheritance from the father*, but not *by purchase under the will of their grandfather*. On the other hand, if William Daniel should die unsurvived by child or descendants, the estate, as we have seen, would pass by the ulterior limitation to the children of Mrs. Spencer.

It must be remembered, in this connection, that the common law construction of the phrase "dying without heirs," and similar expressions, has been changed by statute, which declares that "Every limitation in any deed or will contingent upon the dying of any person without heirs, or heirs of the body, or issue, or issue of the body, or children, or offspring, or descendant, or other relative, shall be construed a limitation to take effect

such person shall die not having such heir, or issue, or son, or offspring, or descendant, or other relative, as the day be, living at the time of his death, or born to him within months thereafter, unless the intention of such limitation be otherwise plainly declared on the face of the deed or will

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creating it." 1 Rev. Code, 1819, chap. 99, sec. 26; Va. Code, 1904, sec. 2422.

The purpose of the statute is to effectuate the intention of the testator by rendering valid a limitation which would have been otherwise invalid as violative of the rule against perpetuities. Since January 1, 1820, words which had previously been construed to mean an indefinite failure of issue are now construed to mean a *definite* failure of issue, and limitations founded thereon are no longer void for remoteness.

The case of *Pettyjohn's Ex'or v. Woodroof's Ex'or*, 77 Va. 507, is greatly relied on to sustain appellants' contention that William Daniel took a life estate and his children a remainder in the land in controversy.

In that case the testator divided his estate equally between his six children and grandson, Seth Woodroof, and provided that if any of the children should die without leaving lawful issue then the share of the child so dying should revert to the surviving children, with similar limitation as to the share of the grandson. Woodroof, after attaining his majority, died unmarried and without issue. The court held that the grandson had a life estate in his share, with remainder to testator's children, contingent upon his dying without issue of his body. There is nothing in the language of the will to justify the statement that Woodroof took a life estate in his share. The bequest was to the children and grandson generally, but with the provision that if any of the legatees "should die without leaving lawful issue," his share should revert to the surviving children. That language, as we have seen, if applied to a devise of land, would not create a *life estate* in the first taker, but a *defeasible fee*. Possibly what the learned judge meant by saying that Woodroof took a life estate in his share was that, inasmuch as he died without issue his actual beneficial enjoyment was for life, since at his death "without leaving lawful issue" the share shifted to others. But however that may have been, the limitation over in that case was to testator's six children, and the



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court properly so held, while in this case the ulterior limitation, in the event of William Daniel dying without child or descendants him surviving, is to the children of the testatrix, Mrs. Spencer.

*Affirmed.*

Statement.

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**Richmond.**

EQUITABLE LIFE ASSURANCE SOCIETY v. WILSON.

January 13, 1910.

Absent, Buchanan, J.

1. **EQUITY PLEADING—Dismissal of Bill—Effect on Cross-Bill.**—Dismissal of an original bill does not necessarily carry with it the cross-bill. If the cross-bill is defensive merely, dismissal of the original bill dismisses the cross-bill, but where the plaintiff in the cross-bill has equities arising out of the subject matter of the original bill which entitle him to affirmative relief of which he would be deprived by the dismissal of his bill, a court of equity will treat the cross-bill as in the nature of an original bill and retain it, and grant the relief to which the plaintiff may be entitled. To do otherwise would manifestly sacrifice substance to form.
2. **INSURANCE—Restrictive Provisions of Policy—Size of Type.**—Under the terms of the statute (Code, sec. 3252) an insurance company cannot defeat recovery on a policy by reliance upon conditions or restrictive provisions thereof not printed in type of the size required by the statute, nor written with pen and ink in or on the policy.
3. **INSURANCE—Forfeiture—Restrictive Provisions of Policy—Size of Type—Inequitable Claim of Assured.**—Where an insurance company is seeking to escape liability for the surrender value of its policy on the ground that the policy was not surrendered within the time prescribed by a provision of the policy, it is not inequitable for the beneficiary, while claiming the surrender value under that same provision, to insist that the time limit fixed by the provision shall be excluded because not printed in type of the required size nor written with pen and ink in or on the policy. This is not a violation of the maxim that "he who seeks equity, must do equity."

Appeal from a decree of the Corporation Court of the city of Newport News. Decree for complainant in cross-bill. Defendant appeals.

*Affirmed.*

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*Opinion.*

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The opinion states the case.

*Wm. W. Old & Son*, for the appellant.

*C. C. Berkeley* and *C. C. Mitchell*, for the appellee.

WHITTLE, J., delivered the opinion of the court.

This appeal is from a decree of the Corporation Court of the city of Newport News, establishing the right of Mollie B. Wilson, widow of John M. Wilson, deceased, to the surrender value of a policy of insurance on the life of her late husband, and decreeing payment thereof by the appellant.

On June 28, 1895, the appellant issued a twenty-year tontine life assurance policy for \$1,000 to Wilson, who designated his wife as the beneficiary. The assured paid ten annual premiums of \$34.10 each on the policy, but failed to pay the premium which fell due on June 27, 1905, and died on November 21, 1906. Though the policy lapsed for non-payment of the premium, nevertheless the list of privileges and conditions indorsed thereon contains the following provision: "If after having been in force for three years it should lapse in consequence of non-payment of any premium, it will have a surrender value in paid-up assurance for as many twentieths of the original policy as complete annual premiums shall have been paid, providing this policy be surrendered within six months after the date of such lapse.

Wilson's administrator filed a bill in equity against the appellant, its superintendent and the widow of the decedent, asserting claim to the surrender value of the policy, and praying that the superintendent be required to disclose the amount for which a paid-up policy should have been issued, and that Mrs. Wilson, the rival claimant, be enjoined from prosecuting any action or suit against the society for the surrender value of the same, but that the amount due be decreed to the plaintiff. Mrs.

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Wilson, in her answer to the bill, which she prays may be treated as a cross-bill, impleads the plaintiff in the original bill and her codefendants, and asserts title to the surrender value of the policy. The trial court dismissed the original bill on demurrer, but adjudged that such dismissal should not affect the right of Mrs. Wilson to maintain and prosecute her cross-bill; and at final hearing passed, in her behalf, the decree now under review.

The appellant seeks a reversal of the decree on three grounds. The first error assigned is to the court's ruling that the dismissal of the original bill did not operate a dismissal of the cross-bill.

Such is unquestionably the correct rule, wherever the relief sought in the cross-bill is defensive merely, and would be satisfied by the dismissal of the original bill. But the rule is otherwise where the plaintiff in the cross-bill has equities arising out of the subject matter of the original suit, which entitle him to affirmative relief, of which relief he would be deprived by the application of the general rule. In such case a court of equity will not suffer its jurisdiction to be ousted by a too rigid adherence to an artificial rule of practice, but will treat the cross-bill as in the nature of an original bill and retain it, granting the relief to which the plaintiff may be entitled. To do otherwise would manifestly sacrifice substance to form.

The case of *Ragland v. Broadnax*, 29 Gratt. 401, aptly illustrates the foregoing principle.

In 2 Barb. Chy. Pr., p. 129, it is said: "The connection of the matter of a cross-bill, be it *per se* legal or equitable, with the subject matter of the original bill, gives the court jurisdiction of the cross-bill, of which it cannot be ousted by a dismissal of the original bill."

The rule is thus stated in 16 Cyc. 468: "Dismissal of the original bill does not necessarily carry with it the cross-bill. If the cross-bill is defensive merely, dismissal of the original dismisses the cross-bill, but if the cross-bill sets up new facts and

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prays for affirmative relief against the plaintiffs in the original, the cross-bill remains for disposition." See also 5 Enc. Pl. & Pr., 663.

The second assignment of error denies the right of Mrs. Wilson to recover, because neither the assured nor she, in his lifetime, made demand for a paid-up policy, with the surrender of the original policy, within six months after the lapse of the original policy.

The provision of Va. Code, 1904, sec. 3252, affords a conclusive answer to this assignment. The section declares, that "In any action against an insurance company or other insurer . . . no failure to perform any condition of the policy, nor violation of any restrictive provision thereof, shall be a valid defense to such action, unless it appears that such condition or restrictive provision is printed in type as large as or larger than that commonly known as long primer type, or is written with pen and ink in or on the policy."

The condition or restrictive provision relied on in this instance is not printed in type of the required size, nor is it written with pen and ink; and, consequently, by the terms of the statute, it cannot be relied on to defeat the recovery. *Burruss v. Nat. Life Ass'n*, 96 Va. 543, 32 S. E. 49; *Nat. Life Ass'n v. Berkeley*, 97 Va. 571, 34 S. E. 469; *Cline v. Western Assurance Co.*, 101 Va. 496, 44 S. E. 700.

In the third and last assignment the appellant invokes the maxim, that "He who seeks equity must do equity."

It would be, indeed, a strange perversion of a maxim, the fundamental purpose of which is to promote justice, so to apply it in this case as to deprive Mrs. Wilson of the benefits of a remedial statute, and enable the appellant, by enforcing a forfeiture, to escape liability upon a contract of the highest dignity.

The decree is plainly right and must be affirmed.

*Affirmed.*

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Statement.

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**Richmond.****EWAN, EXECUTOR V. LOUTHAN AND OTHERS.**

January 13, 1910.

Absent, Buchanan, J.

1. **APPEAL AND ERROR—Issue Out of Chancery—When Ordered.**—Where a charge of fraud is involved, and the evidence is conflicting, and involves the credibility of witnesses, and the proof is not sufficiently definite and certain to satisfy this court that the ends of justice have been obtained by the decree of the trial court, it will reverse the decree and remand the cause for the trial of an issue out of chancery to determine the matter in controversy.
2. **GIFTS—Burden of Proof—Issue Out of Chancery.**—Where a suit in chancery is brought by an executor to recover the possession of bonds of his testator in the hands of one who claims them as a gift from the testator in his lifetime, and an issue out of chancery is ordered to ascertain whether or not there was a completed gift, and whether the testator was induced to make the gift by fraud or undue influence, the burden of proof is on the claimant of the bonds to show that he holds them by virtue of a completed gift made in good faith.

Appeal from a decree of the Circuit Court of the city of Williamsburg and James City county. Decree for the defendants. Complainant appeals.

*Reversed.*

The opinion states the case.

*J. N. Stubbs*, for the appellant.

*B. D. Peachy* and *John W. Friend*, for appellee, H. T. Louthan.

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Opinion.

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KEITH, P., delivered the opinion of the court.

The bill in this case was filed by B. H. Ewan, executor of Mrs. Henrietta H. Van Name, and charges that she died leaving a will in which he was appointed executor; that upon his qualification he discovered that one H. T. Louthan had in his possession two bonds of \$500 each, to-wit: Nos. 33 and 34 of the Williamsburg Knitting Mill, payable to bearer, which he claims belong to the estate of his testatrix, and that she in her lifetime never parted with the title to these bonds, and they ought to come into his hands as part of her estate; that so believing he served notice upon H. T. Louthan and comes into equity asking that an injunction be granted him to restrain Louthan from collecting or transferring said bonds, and the Williamsburg Knitting Mill from paying said bonds to Louthan or any other person.

Louthan answered this bill, admitting that he is in possession of the two bonds, but denying that at the time of her death they belonged to Mrs. Van Name, or that her executor since her death has any right, title or interest in them at law or in equity. Many depositions were taken, and at the hearing the bill was dismissed; and that decree is before us for review.

We do not care to go into a discussion of the evidence, further than to say that it is conflicting and involves the credibility of witnesses; that a charge of fraud is to be determined, and the proof is not sufficiently definite and certain to satisfy us that the ends of justice have been attained by the decree of the circuit court; and in order that the subject may be more fully investigated, an issue in chancery should be framed and tried before a jury to ascertain whether or not the bonds of the Williamsburg Knitting Mill Company Nos. 33 and 34, for the sum of \$500 each, which were the property of Mrs. Van Name, were placed by her in the possession of H. T. Louthan under such circumstances and conditions as constituted a complete gift to him of the said bonds; and if the jury shall believe that the bonds aforesaid were given to H. T. Louthan by Mrs. Van Name in her lifetime, whether she was induced to make the gift

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by fraud or undue influence; and that upon the issues before the jury the burden shall be upon H to show that he holds the bonds by virtue of a c made to him in good faith. *Morgan v. Booker*, 56 S. E. 137; *Helm v. Lynchburg Bank*, 106 Va. 598.

The decree of the circuit court is reversed and remanded to be further proceeded with in accordance with the views expressed herein.



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Statement.

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**Richmond.**

## FENTRESS v. STEELE AND SONS.

January 13, 1910.

Absent, Buchanan, J.

1. EVIDENCE—*Contract in Writing—Parol Evidence to Vary—Incompleteness.*—Where the correspondence between parties shows the entire contract between them, no reference being made therein to any oral negotiations which were to be considered as entering into and forming a part of the contract, parol evidence will not be received to vary or alter the terms of such contract. The written contract cannot be proved to be incomplete by going outside and proving that there was an oral stipulation entered into and not embodied in the written contract.
2. EVIDENCE—*Extension of Credit—Inquiry as to Financial Rating.* Where the defendant has undertaken to show that the plaintiff had not, in the first instance, extended credit to him but had to another, it is permissible for the plaintiff to show that, pending the original negotiations, he enquired into the financial rating of the defendant. Such evidence is admissible to show that the plaintiff was relying on the defendant's credit and ability to pay, and not upon the credit or ability of another.
3. CONTRACTS—*Release—Novation—Intent—Question for Jury—Instructions.*—Whether or not the taking by the plaintiff of the notes of a third party for a debt due the plaintiff by the defendant was a release of the defendant from liability was a question of intent to be determined by the jury from all the evidence in the case, but if there was no evidence sufficient to show such intent, an instruction which told the jury they must find for the plaintiff they believed that he had accepted the third person as his and had agreed to release the defendant from liability for it, was not prejudicial to the defendant.

1 judgment of the Circuit Court of the city of Norfolk proceeding by motion for a judgment. Judgment for  
3. Defendant assigns error.

*Affirmed.*

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Statement.

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The opinion states the case.

After all of the evidence was in the defendant moved the court to give the following instruction:

“The court instructs the jury that if they believe from the evidence that after the sale of the machinery, for the price of which this suit was brought, the defendant informed the plaintiff that the same was bought for the Norfolk Brick Company, Incorporated, and not for himself, and that thereafter the plaintiff accepted and recognized the Norfolk Brick Company, Incorporated, as its debtor therefor instead of the defendant, and did not look to the defendant for the payment of the same, then they must find for the defendant.”

But the court refused to give said instruction as asked, but amended the same so as to read as follows:

“The court instructs the jury that if they believe from the evidence that after the sale of the machinery, for the price of which this suit was brought, the defendant informed the plaintiff that the same was bought for the Norfolk Brick Company, Incorporated, and not for himself, and thereafter the plaintiff accepted and recognized the Norfolk Brick Company, Incorporated, as its debtor therefor instead of the defendant, and agreed to release the said defendant and not look to the defendant for the payment of the same, then they must find for the defendant”; and gave to the jury the said instruction as amended, to which action and ruling of the court in refusing to give the said instruction as asked, and in giving the same as amended, the defendant, by counsel, excepted and tendered this his bill of exceptions No. 5, which is signed, sealed, enrolled and ordered to be made a part of the record.

*Jeffries, Wolcott, Wolcott & Lankford*, for the plaintiffs in error.

*E. R. F. Wells, Hugh C. Davis and Hugh W. Davis*, for the defendant in error.

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Opinion.

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CARDWELL, J., delivered the opinion of the court.

This action was brought by Steele & Sons upon motion pursuant to the statute to recover of the defendant, R. B. Fentress, \$3,262, the price and value of certain machinery sold and delivered by the plaintiffs to the defendant; and at the trial of the cause, on a joinder of the plea of the general issue there was a verdict and judgment for the amount of the debt, with interest as fixed by the verdict of the jury, which judgment we are asked to review and reverse.

For convenience, we shall speak in this opinion of the plaintiffs below, defendants in error here, as Steele & Sons, and the defendant below, plaintiff in error here, as Fentress.

On August 7, 1906, Fentress, of Norfolk city, Va., being desirous of erecting a brick plant in said city, wrote a letter to Steele & Sons, of Statesville, N. C., dealers in brick machines, requesting a quotation of the price of a brick plant such as Fentress wanted, and after some correspondence a representative of Steele & Sons called on Fentress and had an interview with him in regard to the matter. By letter of August 24, 1906, Steele & Sons wrote Fentress making to him a distinct and definite offer to furnish him a certain plant, such as he wanted, at a stipulated price, and after further correspondence Fentress wrote Steele & Sons accepting their offer as set forth in a letter of Steele & Sons to him of August 24, 1906. In this correspondence, Fentress' letters to Steele & Sons were written by him as an individual and upon his private letter head, bearing only his name; and the letters of Steele & Sons were addressed to R. B. Fentress individually, and there is no suggestion in any of this correspondence that Fentress was acting for another or in any other capacity than on behalf of himself individually.

On November 26, 1906, when Fentress was ready for the machinery or plant he wrote Steele & Sons on his private letter paper, signed by him as an individual, requesting shipment of the plant, giving certain shipping instructions; and the plant

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was shipped in accordance with these instructions direct to Fentress; the bill of lading for same being, on December 17, 1906, sent direct to him. At this time a memorandum of the shipment was made by Steele & Sons in the name of R. B. Fentress, but later, in March, 1907, the account was formally charged on their books against "R. B. Fentress, Norfolk B. Co., Norfolk, Va."; it being explained in the evidence in this case that at that time Steele & Sons supposed Fentress called his brick yard the Norfolk Brick Co.—i. e., they thought it was a trade name, and as such, or as a designation of address, they added the words "Norfolk B. Co." to the charge against Fentress.

On June 21, 1907, no payment having been made for the plant Steele & Sons wrote the "Norfolk, Va., Brick Co." (thinking that the name under which Fentress was trading), requesting a settlement of the account, and this letter was replied to by Fentress on June 24, 1907, in which he for the first time (so far as the correspondence goes to show) stated that the Norfolk Brick Co. was a corporation, and suggested that Steele & Sons accept notes of the "Brick Co." in settlement of the account. With respect to that suggestion, quite a correspondence followed between Fentress and Steele & Sons, the result being that on September 21, 1907, the Norfolk Brick Co. sent to Steele & Sons its three notes for \$1,087.33 each, which were accepted by Steele & Sons; but it is insisted on the part of Steele & Sons that at the time of the acceptance of these notes there was no such understanding, expressed or implied, with Fentress, that he was to be released from liability to Steel & Sons on the original contract made with him; and certainly no express contract to that effect appears in the correspondence leading up to the taking of these notes by Steele & Sons, while H. O. Steele, who seems to have conducted the correspondence on the part correspondence, and positively, that he did not intend at any of his firm, testified at the trial of this case with respect to the time to release Fentress from the obligation of the original contract, and that he regarded Fentress as the debtor.

The said notes were not paid at maturity, and this action

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followed, resulting, as stated, in the judgment to which a writ of error was awarded by this court.

It was insisted by Fentress at the trial, that what occurred between him and a representative of Steele & Sons in an interview on August 18, 1906, was competent and relevant testimony with respect to the issue as to what was the contract between the parties, but the court refused to allow this evidence to go to the jury, for the manifest reason that the correspondence in evidence set forth the entire contract between the parties, no reference being made therein to any oral negotiations which were to be considered as entering into and forming a part of the contract; and this ruling of the presiding judge was plainly right. Throughout this correspondence there is not a reference to the Norfolk Brick Company, nothing to intimate that it does not evidence the understanding of the parties, or that Steele & Sons were to look to anyone for the cost price of the brick plant they delivered to Fentress other than Fentress himself. Unlike the case of *Strause v. Richmond Woodworking Co.*, 109 Va. 724, 65 S. E. 659, Fentress conducted his correspondence with Steele & Sons in his individual capacity, and without reference to the liability of anyone other than himself for the purchase price of the brick plant, which was delivered to and accepted by him; and without reference to any negotiations other than by correspondence that were to enter into and form a part of the contract, or of the evidence of the contract; while in the *Strause* case there was not only enough in the correspondence to show that oral negotiations were to be considered in determining what the contract was, as to who was to be bound for the purchase price of the articles ordered by Strause "for American Shock Binder Corp.," but the articles were actually delivered to the corporation, and there was no intimation of a purpose on the part of the vendor company to demand payment of Strause until the corporation, from which part payment had been received, became insolvent. Here Fentress set up no claim that he was not bound by his contract evidenced by the correspond-

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ence with Steele & Sons to pay for the brick plant shipped to and received by him until the brick company he organized and capitalized had become hopelessly insolvent.

In 17 Cyc., p. 716, the law is stated to be, that if the written agreement imports on its face to be a complete expression of the whole agreement—that is, contains such language as imports a complete legal obligation—it is conclusively presumed that the parties have introduced into it every material term, and parol evidence cannot be admitted to add another term, although the writing is silent as to the particular one to which the parol evidence is directed. The writing cannot be proved to be incomplete by going outside and proving that there was an oral stipulation entered into and not contained in the written agreement, nor can parol evidence be admitted to prove a contemporaneous agreement that a written instrument which appears upon its face to be duly executed, intelligible, unambiguous, reasonable and complete, should be considered only as the basis or outline of a contract to be subsequently filled out with stipulations other than those stated in the writing.

The case of *Walker v. Christian*, 21 Gratt. 291, relied on by counsel for Fentress, fully recognizes the principle stated in the quotation just made. See also *Waddill v. Seabee*, 88 Va. 1015, 14 S. E. 849, 29 Am. St. Rep. 766; *Newberry L. Co. v. Newberry*, 95 Va. 119, 27 S. E. 899; 1 Greenleaf on Ev. (16 ed.) secs. 277-281. This principle is, however, recognized in all courts, and further citation of authority is unnecessary. Moreover, if the evidence rejected by the court in this case had been admitted, its effect would not have been to discharge Fentress from liability on the contract. Its only effect would have been to show that there was a liability on the Norfolk Brick Company as well as Fentress. *Strause v. Richmond Woodworking Co.*, *supra*.

While H. O. Steele was testifying on behalf of the plaintiff, he was, over the objection of the defendant, permitted by the court to state that while the negotiations for the sale of the

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brick machinery to the defendant, Fentress, were going on, he (witness) inquired into "the rating," the "financial rating" of Fentress; and this ruling of the court is assigned as error.

We are of opinion that there is no merit in this assignment. The evidence was relevant as tending to show that the plaintiffs, Steele & Sons, in making the contract with Fentress, were relying on his credit and ability to pay, and not upon the credit or ability to pay of another. The questions propounded to the witness, H. O. Steele, were not propounded and permitted to be answered until the defendant had undertaken to show that the plaintiffs, Steele & Sons, had not in the first instance considered that Fentress was their debtor.

The court instructed the jury that the letters which passed between the plaintiffs and the defendant, Fentress, prior to the sale and delivery of the machinery to Fentress, constituted a contract whereby the plaintiffs became bound to sell and deliver to Fentress the machinery mentioned, and Fentress became bound to pay the plaintiffs the purchase price of same, in accordance with the provisions set forth in those letters; and the giving of this instruction is assigned as error.

We are of opinion, for the reasons already stated, that this was not error. Now whether or not the subsequent transaction in which the plaintiffs took the notes of the Norfolk Brick Company for the amount of the indebtedness to the plaintiffs for the machinery was a release of Fentress from liability, was a question of intent, a fact for the jury to determine upon all the evidence in the case; and since there is no evidence in the

ing to show, certainly none sufficient to show, that the intent of the parties, the instruction could not prejudice the jury to the prejudice of the defendant Fentress. Again re-stating the evidence, it need only be said plainly sufficient to warrant the jury in their finding. The assignment of the trial court refusing to set the verdict aside without error.

The assignment complained of is affirmed.

*Affirmed.*

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Statement.

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**Richmond.**

HOUFF &amp; HOLLER v. GERMAN-AMERICAN INSURANCE CO.

January 13, 1910.

Absent, Buchanan and Harrison, JJ.

1. **INSTRUCTIONS**—*Referring Questions of Law to the Jury.*—It is error for the trial judge to refer to the jury the determination of a question of law raised by a hypothetical case stated in an instruction.
2. **FIRE INSURANCE**—*Iron Safe Clause—Inventory—General Footings Without Items.*—General footings of the value of each line of goods in a stock, taken from an itemized statement (not produced) of all of each line of such goods, without showing the items or their values, is not such a complete itemized inventory of the stock of goods on hand as is required by the "iron safe clause" of the fire insurance policy sued on in this action.
3. **FIRE INSURANCE**—*Iron Safe Clause—Account Books—Bank Book.*—A bank book in which is credited to the assured (a mercantile firm) all money collected during the existence of a policy of insurance, whether from accounts made prior to the inventory or for cash sales thereafter, moneys collected by one of the assured from a separate business, and moneys given to the assured by persons who desired him to give checks for their use, does not constitute a book showing clearly and plainly such a complete record of all sales and shipments, both for cash and credit, as is required by the "iron safe clause" of the fire insurance policy sued on in this action.

Error to a judgment of the Circuit Court of Augusta county in a proceeding by motion for a judgment. Judgment for the defendant. Plaintiffs assign error.

*Affirmed.*

The opinion states the case.

*Charles & Duncan Curry and R. S. Ker, for the plaintiffs in error.*



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*Hanckel & Hanckel, A. C. Gordon, and Joseph A. Glasgow,*  
for the defendant in error.

KEITH, P., delivered the opinion of the court.

The appellants brought suit in the Circuit Court of Augusta county against the German-American Insurance Company to recover the amount of a fire insurance policy for \$1,000. The case went to a jury, which gave a verdict for the plaintiffs for the full amount of the policy, which upon motion of the defendant was set aside, and at a subsequent trial there was a verdict and judgment for the defendant.

With respect to the second trial no error is assigned, so that we have only to consider the bills of exception taken to the rulings of the court upon the first trial, and to determine whether or not the court erred in setting aside the first verdict.

Upon the first trial there was evidence which proved, or tended to prove, that in the year 1907 the plaintiffs conducted a general mercantile business in the county of Augusta, and that on the 2d of February of that year the German-American Insurance Company issued a fire insurance policy for \$1,000 on their stock of goods; that at that time the plaintiffs already held two policies on their stock, one for \$1,500, issued to them by the Hartford Insurance Company, and the other for the same amount issued by the London Mutual. Taylor & Perry, of Staunton, Va., were the general agents of the German-American Insurance Company, and by letter dated the 1st of February, 1907, plaintiffs applied to them for insurance, which was issued on the next day, and at the time this application was made to them as agents they were asked to come and examine the stock of goods plaintiffs then had on hand in their store. They did not, however, examine the stock until the latter part of September, 1907, and on the night of the 6th of November of the same year the entire stock of goods, estimated to be of the value of \$5,455.18, was completely destroyed by fire.

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The examination of the stock above referred to was made by William J. Perry, the active member of the firm of Taylor & Perry. Plaintiffs had taken an inventory of their stock on January 7, 1907, which showed that at that time it was of the value of \$5,455.18, and this inventory and the books and files showing a complete record of their business from the date of the inventory to that time were shown to Mr. Perry and carefully examined by him, and after having looked into and investigated everything he expressed himself as perfectly satisfied, and in fact was so well satisfied that he told plaintiffs that they did not have sufficient insurance to cover their stock, and urged them to take out more insurance in his company. The company, after it had received notice of the character of records that plaintiffs had and kept of their business, through their general agents, Taylor & Perry, made no objection whatever to their inventory or to the mode of keeping their records, and in effect gave them to understand that the company was perfectly satisfied, and petitioners relying upon this assurance of the company's agents, and upon the fact that they were not asked to change their mode of keeping records after full notice, plaintiffs in no way changed their mode of bookkeeping, and their entire stock of goods was consumed by fire on the 6th day of the following November, and plaintiffs never received any intimation of any objection to the character of their records and to their manner of keeping the same until some days after the fire.

These are such of the facts which the evidence of plaintiffs tended to prove as we deem material to the questions which we shall discuss, and upon which our judgment will depend.

The defendant relied for its defense upon the following clauses of the policy:

"1st. The assured will take a complete itemized inventory of stock on hand at least once in each calendar year, and unless such inventory has been taken within twelve calendar months prior to the date of this policy, one shall be taken in detail

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within thirty days of issuance of this policy, or this policy shall be null and void from such date, and upon demand of the assured the unearned premium from such date shall be returned.

"2d. The assured will keep a set of books, which shall clearly and plainly present a complete record of business transacted, including all purchases, sales and shipments both for cash and credit, from date of inventory as provided for in first section of this clause, and during the continuance of this policy.

"3d. The assured will keep such books and inventory, and also the last preceding inventory, if such has been taken, securely locked in a fire-proof safe at night, and at all times when the building mentioned in this policy is not actually open for business; or, failing in this, the assured will keep such books and inventories in some place not exposed to a fire which would destroy the aforesaid building.

"In the event of failure to produce such set of books and inventories for the inspection of this company, this policy shall become null and void, and such failure shall constitute a perpetual bar to any recovery thereon."

There was evidence tending to show that an inventory of the stock on hand was taken on the 7th of January, 1907, as follows: "Shoes, 1,200 prs., cost \$1,800.00; gloves, 70 prs., \$70.00; dry goods and notions, \$1,400.50; groceries, tobacco, cigars and drugs, \$1,635.35; crockery, queensware, agateware, \$250.00; tinware, \$68.00; paint and oils, \$71.00; hats, \$174.50; stove fixtures, scales, \$60.00; showcase, oil cans, etc., \$40.00; produce, eggs, chickens, ginseng, furs, walnut kernels, \$98.00. The total aggregating \$5,662.35.

It is conceded that this inventory is not such a one as a skilled bookkeeper, or careful, painstaking business man would have taken; but it is contended that all that is necessary, and all that the law requires, is that the amount of stock on hand could be ascertained and understood from the inventory by anyone with reasonable intelligence, and that a strictly literal compliance with what is known as the "iron safe clause" of the policy is not ne-

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cessary; that the test is simply whether or not a man of ordinary intelligence would be able, from the inventory, to say what amount of stock petitioners had on hand at the time of the inventory; citing in support of these views *North British & Mer. Ins. Co. v. Edmondson*, 104 Va., 486, 52 S. E. 350.

It is also conceded that the plaintiffs did not keep a record of daily sales; but it is claimed that their bank book, which was exhibited as evidence, showed the cash sales which they had made from the date of the inventory until the happening of the fire; that plaintiffs kept a record of all their credit sales, which appear in the ledger; that while plaintiffs did not enter upon the ledger the purchases they made, they kept invoices showing all the purchases, instead of keeping a ledger for that purpose; and that while these invoices were destroyed they were duplicated and from these records the stock on hand at the date of the fire was ascertained to be \$5,455.18.

There was evidence, on the other hand, to show that the bank account did not discriminate between deposits made by the firm of Houff & Holler, on account of their mercantile transactions, and those made by the individual members of the firm in their private capacity; and with respect to the failure to keep accurate books of accounts conforming strictly to the terms of their covenant, plaintiffs again rely upon the case above cited of *North British & Mer. Ins. Co. v. Edmondson*, where it is said: "The covenant and agreement to keep a set of books showing a complete record of business transacted, including all purchases and sales both for cash and credit, together with the last inventory of the business, should not be interpreted to mean such books as would be kept by an expert bookkeeper or accountant in a large business house in a great city. That provision is satisfied if the books kept were such as would fairly show a man of ordinary intelligence all the purchases and sales both for cash and credit."

This statement of the tendency of the evidence is sufficient for the purpose of determining whether or not the jury were properly instructed upon the first trial.

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On behalf of the plaintiffs the court told the jury, among other things (3), "that if they believe from the evidence in this case that an inventory, substantially in accordance with the requirements of the policy, was made out by the plaintiffs, within the time prescribed by the terms of the policy sued on, that then this was a compliance on the part of the plaintiffs with the requirements on their part to make an inventory provided for in the policy; and the defense that the plaintiffs did not make such inventory provided for in the policy cannot be considered by the jury"; and (4) "that if they believe from the evidence in this case that the defendant company waived any of the requirements or conditions of the policy sued on, then the jury are instructed that such a waiver is equivalent to the performance by the plaintiffs of such requirements or conditions as the jury may believe from the evidence were so waived, and they are instructed that this waiver may have been made expressly or impliedly."

In the case of *Phoenix Ins. Co. v. Sherman*, ante, p. 435, 66 S. E. 81, a clause in a policy similar to the one under consideration was before this court. The inventory there relied upon was in almost every particular similar to that in this case, and this court held that "there is nothing unreasonable in the requirements of the 'iron safe clause' found in every policy of insurance issued on a shifting stock of merchandise. Under that clause the insurer has a right to such a compliance with its terms as will inform him during the life of the policy, fairly and intelligently, as to the stock of merchandise carried by the insured, and, in case of loss by fire, as to the stock of merchandise burned and the fair cash value thereof; and it is no hardship upon the insured to comply with this requirement of his policy. Any other rule would open wide the doors for the perpetration of frauds and the grossest impositions upon insurers." And after a discussion of many authorities it was held that the inventory was not a sufficient compliance with the covenants contained in the policy. That is a well considered case, and correctly states our view of the law.

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It is apparent from the petition, the record and the briefs of counsel for plaintiffs in error that their chief reliance is upon the conduct of the agents of the insurance company when an examination was made of the stock of goods in September, 1907, and the company, through its agents, as is contended by plaintiffs in error, was made aware of the condition and amount of stock, and the manner in which the business was conducted; and this knowledge and acquiescence it is claimed constituted a waiver of the requirements and conditions of the policy sued upon and are equivalent to their performance.

Without undertaking to determine whether or not the circumstances relied upon by plaintiffs in error constitute an estoppel upon the company to rely upon the clause in the policy which has been quoted, or as a waiver, either express or implied, of the requirements and conditions of that clause—without even undertaking to say whether or not the circumstances relied upon tended to support the claim of waiver or estoppel; but assuming for our present purposes that the evidence had such tendency, and that the conditions could have been waived by the agents of the company, notwithstanding the provision of the policy that no agent should have power to waive any of its provisions or conditions, unless such waiver be written upon or attached to the policy, we shall proceed to the consideration of two instructions asked for on behalf of the defendant in error.

“The court instructs the jury that if they believe from the evidence the plaintiffs in this case adopted the following method of taking an inventory, that is, they took upon a piece of paper an itemized statement of all of each line of goods in their stock, and that they then footed up the value of said items, and that the footings so obtained and compiled they now present as their inventory, and that they did not preserve the pieces of paper on which the items and their values were recorded, but only preserved the general footings of each line of goods in their stock, then the court instructs the jury that this alleged inventory, based upon said footings, is not a complete itemized inventory

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of the stock of goods on hand and provided for in the policy sued upon."

This instruction, we think, is a correct statement of the law as declared by this court in *Phoenix Ins. Co. v. Sherman, supra*. The court refused to give it in this form, however, but added thereto, after the word "footings" toward the close of the instruction, the words "is a matter for the jury to consider whether or," so as to make the concluding clause of that sentence read, "then the court instructs the jury that this alleged inventory, based upon said footings, is a matter for the jury to consider whether or not a complete itemized inventory of the stock of goods on hand and provided for in the policy sued upon."

Here was a hypothetical case stated. All of the facts upon which it was conditioned were set out, and the court was asked to tell the jury what was the law upon the facts as stated. If the court had refused that instruction, as asked for, because in its opinion it was erroneous in having omitted all reference to the waiver contended for by plaintiffs in error, such refusal might or might not have been proper, according as we determined whether or not there was sufficient evidence of waiver to justify an instruction from the court with respect to it; but the court did not reject it for that or for any other reason. Taking the hypothetical case, as it had been stated to the court by the defendant in error, the court declined to express to the jury its opinion as to the law arising upon those facts, and by its interpolation left the question of law upon which the opinion of the court had been asked to the decision of the jury. In this ruling of the circuit court we think there was error.

Defendant in error asked the court further to instruct the jury that "if they believe from the evidence the plaintiffs adopted the following method of keeping such books, as they claimed to have kept, to show sales made by them for cash or credit, that is, they deposited in the bank to their credit all money collected during the existence of the policy, whether from accounts that were made for goods sold prior to the alleged inventory, or



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for goods sold for cash thereafter, and also deposited along with said sums to their credit in the same account moneys collected by Jos. W. Houff, one of the plaintiffs, from his farm, and also from a separate business in which he was interested, as a butcher, and also moneys collected by him in his business as postmaster, and also deposited in said account moneys that were left with him by individuals who desired the plaintiffs to give them a check for their uses, then said bank book does not constitute a book showing clearly and plainly a complete record of all sales and shipments, both for cash and credit, as is provided for in the policy sued upon in this case, and the production of such book did not constitute a substantial compliance with the terms of the policy.”

But the court refused to give the instruction in the form above set out, but modified and gave it in the following words: “The court instructs the jury that if they believe from the evidence the plaintiffs adopted the following method of keeping such books, as they claimed to have have kept, to show sales made by them for cash or credit, that is, they deposited in the bank to their credit all money collected during the existence of the policy, whether from accounts that were made for goods sold prior to the alleged inventory, or from goods sold for cash thereafter, and also deposited along with said sums to their credit in the same account moneys collected by Jos. W. Houff, one of the plaintiffs, from his farm, and also from a separate business in which he was interested as a butcher, and also moneys collected by him in his business as postmaster, and also deposited in said account moneys that were left with them by individuals who desired the plaintiffs to give them a check for their uses, it is for the consideration of the jury as to whether said bank book does constitute a book showing clearly and plainly a complete record of all sales and shipments, both for cash and credit, as is provided for in the policy sued upon in this case, and the production of such book did or did not constitute a substantial compliance with the terms of the policy.”



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For the reasons given in the consideration of the modification of instruction No. 2, we are of opinion that the modification of instruction No. 3 was also erroneous.

Upon the whole case we are of opinion that there was error in the first trial which rendered it proper for the circuit court to set aside the verdict and judgment then rendered, and that as there was no error in its judgment on the second trial it must be affirmed.

*Affirmed.*

Statement.

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**Richmond,**

JOHNSON v. MICHAUX.

January 13, 1910.

Absent, Buchanan, J.

1. **APPEAL AND ERROR—Appellant to Show Error.**—The burden is the appellant to satisfy this court that there was error and prejudice in the decree of the trial court, and, failing in this, the decree will be affirmed.
2. **OYSTER LAND—Transfer—Writing Without Seal.**—A valid and legal writing, not under seal, transferring to the grantee in writing oyster grounds leased by the grantor from the Commonwealth is sufficient as between the parties for that purpose.

Appeal from a decree of the Circuit Court of Warrenton county. Decree for the defendant. Complainant appeals.

*Affirmed*

The paper sought to be annulled in this case was purported to be a deed duly signed and acknowledged by the grantor, and attested by a witness. In fact, the grantor employed a colored attorney to write the deed, and verbally authorized the subscribing witness to sign his name thereto as written. The attorney, who was also the notary who wrote the certificate of acknowledgment, prepared the deed, and the attesting witness signed the name of the grantor thereto opposite the seal, and his own name as witness, and the notary certified the acknowledgment as made by the grantor.

*J. N. Stubbs and Philip St. Geo. Willcox, for the appellant.*

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*Ashby & Read*, for the appellee.

KEITH, P., delivered the opinion of the court.

Henry Johnson filed his bill in the Circuit Court of Warwick county, in which he shows that one hundred acres of oyster planting ground in James river were assigned by the oyster inspector to Broadfield, Gardner and himself, and that it was surveyed, platted, staked and recorded in the clerk's office of the County Court of Warwick county, as required by statute; that they immediately entered into the possession of the ground and commenced to improve the same by planting oysters; that Gardner relinquished his interest to Broadfield and complainant, who remained in possession until by mutual consent they made partition of said land, each taking fifty acres thereof; that the fifty acres assigned to him has remained in his actual possession from such assignment and partition up to the filing of the bill; that he had recently learned that one Henry Michaux had had recorded in the clerk's office of the Circuit Court of Warwick county a deed purporting to be signed, sealed and acknowledged by complainant, conveying to him (Michaux) complainant's whole right, title and interest in said fifty acres of ground for the sum of two hundred and fifty dollars. Complainant alleges that he never "made, signed, sealed, acknowledged or delivered the said pretended deed to the said Michaux, and that the same, so far as it purports any signing, sealing or acknowledging by this complainant, is a forgery, and an attempted fraud upon the vested rights of this complainant, and your complainant is advised will, upon proof of the facts hereinbefore alleged, be declared annulled, canceled and absolutely void and of no effect"; that "Michaux has, within the last few days, attempted and is now attempting to exercise rights of ownership over the said ground by taking oysters therefrom, to the wrong and irreparable injury of your complainant; he, the said Michaux, being wholly insolv-

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ent and financially irresponsible." The prayer of the bill is that Michaux, his employees, agents and attorneys may be enjoined and restrained from taking oysters from complainant's grounds, and otherwise interfering with him in the full and free use of the same.

Michaux demurred to and answered this bill, denying all of its material averments, and gives the following account of the transaction: That complainant, on the 18th day of May, 1904, gave a deed of trust or mortgage on the property in question, to secure the payment of \$250 to Jessie Taylor, which deed of trust was duly signed and acknowledged by Johnson, but was never recorded; that Taylor afterwards insisted that complainant pay the indebtedness, and offered to sell the same to respondent, who, after seeing Johnson, bought the same from Taylor, and on October 27, 1906, was given a deed of trust by complainant on the following property: "All that certain piece or parcel of ground consisting of one hundred acres, more or less, on the James river, staked off for oyster planting, near 'Brown's Shoals,' in the county of Warwick, State of Virginia, with all of its improvements and oysters thereon, known as 'Henry Johnson's oyster ground,' and including all property appertaining to the oyster industry, boats, oyster-tongs and all appurtenances thereto." This indebtedness was evidenced by a note made by Johnson and endorsed by Taylor. This deed of trust, though duly signed by Henry Johnson, was at Johnson's request never put on record. It is averred that Johnson was in default in the payment of said sum of \$250 to respondent, and while indebted requested respondent to pay off the taxes due upon said oyster planting ground, which respondent refused to do unless the matter was put in better shape than it was at that time; that Johnson then agreed to give respondent a one-half interest in the property in settlement of said indebtedness, and with one W. J. Gordon came to the office of N. B. Clark, in the city of Newport News, and there executed the deed filed

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as Exhibit "A" with complainant's bill, W. J. Gordon signing as a witness; that respondent was not present when this transaction took place, but one or two other persons were present, and that the matter was understood by Johnson, and the paper writing freely executed by him; that respondent did not obtain possession of the deed for some time after it was executed, when it was handed to him by Clark and was mailed to the clerk's office of Warwick county and duly recorded; and that said deed was and is binding upon Johnson, and cannot be set aside and annulled in this or any other proceeding. It is further averred in the answer that Henry Johnson is in possession of the said fifty acres so conveyed to respondent and is getting oysters therefrom; that Johnson is insolvent, and this taking of the oysters is being done to the irreparable damage of respondent. Wherefore, he prays that this answer may be treated as a cross-bill, and that Johnson, his employees, agents and all others, may be enjoined and restrained from going upon the said oyster ground and taking therefrom oysters or any other things, or working or interfering with the said oyster ground in any way whatever.

Many depositions were taken on the part of both plaintiff and defendant; and the case coming on to be heard upon the bill and answer, and the exhibits filed with them, and the depositions of witnesses, the court dismissed the bill, and the plaintiff applied for and obtained an appeal from one of the judges of this court.

The prayer of the answer that it might be treated as a cross-bill seems to have been disregarded by the court and the parties. It is certain, at least, that no answer to it as a cross-bill appears in the record.

The bill is exceedingly general in its terms. In the sixth paragraph the complainant alleges "that he never made, signed, sealed, acknowledged or delivered the said pretended deed to the said Michaux, and that the same, so far as it purports any signing, sealing or acknowledging by this complainant, is a

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forgery, and an attempted fraud upon the vested rights of this complainant." That he never signed, sealed, or acknowledged Exhibit "A," to which this paragraph alludes, may be true, and yet be perfectly consistent with the theory upon which the circuit court decided the case, for the court does not treat Exhibit "A" as a deed, but was of opinion that upon the proof it "must be held a valid and binding writing not under seal, and that such a writing is sufficient to pass the oyster ground therein mentioned." The account of the transaction given by the defendant in the answer, on the contrary, is detailed and specific. The evidence on both sides is obscure and unsatisfactory, and we shall not undertake to criticise and discuss it. The burden was upon the appellant to satisfy us that there was error to his prejudice in the decree of the circuit court, and this he has failed to do.

We are of opinion that the paper writing marked Exhibit "A" and filed with the bill is not shown to have been procured by fraud.

We confine ourselves strictly to the issue made, and express no opinion and decide nothing as between the Commonwealth and the parties to this controversy. In other words, the rights which Johnson had, whatever they may have been, in the twenty-five acres of oyster planting ground are vested in Michaux, but we say nothing as to the interest Michaux takes in those grounds as between himself and the Commonwealth.

The decree is affirmed.

*Affirmed.*

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Statement.

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**Richmond.**

## MYERS, RECEIVER v. COMMONWEALTH.

January 13, 1910.

Absent, Buchanan, J.

1. TAXATION—*Funds in Court Before Report of Debts.*—Under the provisions of the statutes of this State money arising from the sale of a debtor's personal property at the suit of creditors, and on deposit in bank, is amenable to taxes before a report of debts has been made, but not after.
2. DOUBLE TAXATION—*Subjects Held by Different Titles.*—Taxation is not double where the subject is held by different titles. Both debtor and creditor may be taxed—the one on his property, and the other on his security—as in case of a mortgage, where the mortgagor is taxed on the full value of his property and the mortgagee on the full amount of his debt.
3. TAXATION—*Power to Tax—Legislative Function—Interference by Courts.*—The power of taxation is an attribute of sovereignty, and, under our system of government, its exercise is vested exclusively in the legislative department; and when the power exists, the courts cannot interfere on mere questions of expediency.

Error to a judgment of the Hustings Court of the city of Richmond on a motion to correct an erroneous assessment for taxes. Judgment for the defendant. Petitioner assigns error.

*Affirmed.*

The opinion states the case.

*J. Jordan Leake and Christian, Gordon & Christian, for the plaintiff in error.*

*Robert Catlett, Assistant to the Attorney General, for the Commonwealth.*

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WHITTLE, J., delivered the opinion of the court.

This writ of error is to a final order of the Hustings Court of the city of Richmond denying the application of the plaintiff in error to exonerate a fund on deposit to the credit of the chancery court of the city, in the creditors' suit of *S. H. Hawes & Co. v. W. R. Trigg Co.*, from an alleged erroneous assessment of taxes for the year 1904.

There had been no report of debts in the case at the time of the assessment, and the sole question for our determination is whether money arising from the sale of a debtor's personal property at the suit of creditors is amenable to taxes before a report of debts has been made.

The proposition depends upon the construction of subsection 6 of section 8, schedule C, of the tax bill. (Appendix Va. Code, 1904, p. 2195, read in connection with sections 492, 492-a and 492-b, Va. Code, 1904.) These enactments are as follows:

"Sixth. Money and credits or personal estate deposited to the credit of any suit, and not in the hands of a receiver, except funds, credits, or estate, placed in the hands of the receiver of a court or deposited to the credit of a suit to await adjudication and disbursement upon debts reported in suits or proceedings pending in such courts, shall not be listed for taxation."

"Section 492. *By whom property is to be listed; to whom taxed.* . . . provided, that funds, credits, or estate in the hands of a receiver of a court, or deposited to the credit of a suit, to await adjudication and disbursement upon debts reported in suits or proceedings pending in such court, shall not be listed for taxation."

"Section 492-a. . . . That all notes, bonds or other evidences of debt held subject to the order of any court or receiver or commissioner of said court, whether executed for the purchase price of real or personal property, shall be taxed to the



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clerk of said court or to receiver or commissioner, as the same may be so held or payable, and shall be exempted from taxation in the name of parties beneficially interested therein.”

“Section 492-b. No decree or order shall be entered by any court . . . directing the payment, . . . or other distribution of any funds, securities, moneys, or other property under its control or under the control or in the hands of any receiver, commissioner or other officer of the court, or any fiduciary, until all taxes and levies upon such funds, securities, moneys, or other property are paid, unless the payment thereof be provided for in such decree or order; and no commissioner, fiduciary, receiver, trustee, or bank, or other person or corporation shall pay out any funds in hand under the order of any court unless a receipt for the taxes is produced showing said taxes have been paid.”

It is clear that by the express terms of subsection 6, iterated in section 492, the money in dispute was liable to tax as a court fund until a report of debts had been made. Such report is essential in order that the court may intelligently adjudicate the respective rights of creditors in the fund, and appropriate it to the payment of their demands. It was also necessary for the legislature, during the transition period, to fix the precise time at which liability of money, etc., on deposit, to taxation as a *court fund* should cease; and it seems to us that it has accomplished that purpose in unmistakable language.

It is insisted, however, that this interpretation of the statute would result in taxing creditors twice on the same value, and the cases of *Fulkerson v. Bristol*, 95 Va. 1, 27 S. E. 815, and *McNeill, Assignee v. Hogerty, Auditor*, 51 Ohio St. 255, 37 N. E. 526, 23 L. R. A. 628, are cited to show that such tax is unlawful.

The Virginia case arose under V. C. 1887, sec. 493, which provides the mode in which a list of bonds and other evidences of debt held by commissioners or receivers under authority of a

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court shall be furnished by the clerk to the commissioner of the revenue. But that section expressly excludes from such list "bonds or other evidences of debt executed for the purchase price of property," and, therefore, the court necessarily held that such securities were not subject to taxation.

So, in the Ohio case, it is said: "It is not necessary to hold that the legislature might not include assignees in the class of trustees who are required to list property in their hands, even though duplicate taxation results. It is enough, for the disposition of the present case, if the purpose to do so has not been expressed." The court then proceeds to hold that the Ohio statute does not make it the duty of "an assignee of an insolvent whose estate is being settled in the probate court, to list the property so held by him for taxation."

"The present case does not, in our judgment, involve the question of duplicate taxation. For certain it is that the great weight of authority sustains the doctrine that taxation is not double where the subject is held by different titles; and that both debtor and creditor may be taxed, the one on his property and the other on his security.

The rule is stated in 27 Am. & Eng. Enc. of Law, 609, as follows: "But where two persons hold different interests in the same thing, each may properly be taxed, as they do not hold by the same title. Thus, the legislature has power to tax a debtor in the full value of all the property owned by him, without deducting the amount of his indebtedness, and at the same time to tax the creditor on the amount due him; or to tax mortgages at their face value, while the property upon which they are secured is also fully taxed." *Cooper v. Board of Review*, 207 Ill. 472, 69 N. E. 878, 64 L. R. A. 72; *Adams v. Kuykendall*, 83 Miss. 571, 35 South. 830; *Gerard v. Duncan*, 84 Miss 731, 36 South. 1034, 66 L. R. A. 461; *Cooley on Taxation* (3d ed.), pp. 388, 390-394.

**Opinion.**

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The power of taxation is an attribute of sovereignty, and under our system of government its exercise is vested exclusively in the legislative department; and when the power exists the courts cannot interfere on mere questions of expediency.

*Affirmed.*

**Richmond.**

MYERS, RECEIVER, v. CITY OF RICHMOND.

January 13, 1910.

Absent, Buchanan, J.

1. **TAXATION—City of Richmond.**—The City of Richmond has powers of taxation upon all property and subjects assessed with State taxes against persons residing therein; hence the judgment ruled by *Myers v. Commonwealth*, ante. p. 600.

Error to a judgment of the Hustings Court of the City of Richmond on a motion to correct an erroneous assessment of taxes. Judgment for the defendant. Petitioner assigns error.

*Aff*

*J. Jordan Leake and Christian, Gordon & Christian* plaintiffs in error.

*H. R. Pollard and Geo. Wayne Anderson*, for the defendant in error.

WHITTLE, J., delivered the opinion of the court.

The city of Richmond has plenary power under the law, Va. Code, 1904, sec. 1043, and its charter to make and collect taxes upon all property and subjects assessed with State taxes against persons residing therein. Consequently, this case is the case of *Lilburn T. Myers, Receiver, v. Commonwealth*, ante. p. 600, 66 S. E. 824, in which an opinion has just been rendered sustaining the validity of the tax in question so far as the State is concerned.

*Aff*

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Syllabus.

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**Richmond,**

NORFOLK AND WESTERN RAILWAY CO. v. SOLLENBERGER'S ADMINISTRATOR.

November 18, 1909.

January 13, 1910.

Absent, Buchanan, J.

1. RAILROADS—*Negligence—Persons on Track—Trespasser—Infants—Misrepresentation as to Age.*—A railroad company is liable for an injury inflicted upon one on its track, even though he were a trespasser, if, after it discovered his peril, or had such notice thereof as would put a reasonably prudent man on the alert to discover the same and avert the injury, it failed to do all within its power, consistent with its other duties, to avoid inflicting an injury upon him. The fact that the plaintiff was an infant and obtained employment with defendant through misrepresentation as to his age would not relieve the defendant from liability for an injury inflicted under such circumstances.
2. RAILROADS—*Negligence—Employee Asleep on Track—Contributory Negligence.*—Although an employee of a railroad company may have been on duty for forty-eight consecutive hours, it is none the less contributory negligence on his part to fall asleep on a railroad track in daily use. His folly, or misfortune, however, would not excuse the railroad company in inflicting an injury upon him if it knew, or, by the exercise of reasonable care after it was put on notice, could have known, the peril in which he stood. In the case at bar the evidence does not establish negligence on the part of the railway company.
3. EVIDENCE—*Experiments—Negligence.*—It is impossible by tests subsequent to an accident, however faithfully they may be executed, to reproduce conditions as they actually existed. The mental attitude of the actors who know the positions of parties and what is to be expected is wholly different, and the case at last must be determined upon the evidence of the witnesses who were present upon the occasion of the accident, and who testify as to what they saw and heard of the actual occurrence.

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4. **RAILROADS—Negligence—Sudden Emergency.**—An engineer of a rapidly moving engine who shuts off steam and applies his air brakes immediately when confronted with a sudden emergency, cannot be said to be guilty of negligence because he did not also use sand to stop his train. He has to deal with small fractions of time, and cannot act with deliberation.
5. **VERDICTS—Evidence—Inferences From Opinion of Witness—Case at Bar.**—The jury, in the case at bar, would not have been warranted in exonerating the plaintiff's intestate from the consequences of his gross contributory negligence by reason of the inferences drawn from the opinion of a witness who appears to have been in error as to the most essential condition upon which that opinion was predicated.

Error to a judgment of the Circuit Court of Wise county in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

*Reversed.*

The opinion states the case.

*Ayers & Fulton* and *Theodore W. Reath*, for the plaintiff in error.

*Bullitt & Chalkley* and *Paul Petit*, for the defendant in error.

KEITH, P., delivered the opinion of the court.

This is an action brought by Sollenberger's administrator to recover damages for the death of his intestate, alleged to have been caused by the negligence of the railway company. A verdict and judgment was rendered against the company, which is now before us upon a writ of error.

Sixteen grounds of error are assigned in the petition, the first of which is to a judgment overruling the demurrer to the declaration and each count thereof.

This assignment is not well taken. The declaration originally consisted of three counts. The demurrer to the first count was sustained and it passed out of the case.

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The second count states that the plaintiff's intestate was in the employ of the railway company as a flagman, and having been constantly employed for forty-eight hours consecutively, he became exhausted, was unable to keep awake, and fell asleep upon the main track of the defendant company some distance in the rear of the defendant company's wrecking train, and that thereupon the defendant company wrongfully and negligently backed its train of cars, without any watch or lookout, and without any warning to plaintiff's intestate of the approach of the engine, although the defendant discovered, or could by the use of ordinary care and diligence have discovered, the plaintiff's intestate upon the track and his perilous position, with its train moving backwards, inflicted mortal injuries from which he thereafter died. The third count is, in this respect, substantially identical with the second.

Now, although the plaintiff's intestate may have been an infant, who, without the consent of his parents, sought employment as a brakeman with the railroad company, and by misrepresentation as to his age induced the company to give him employment, if indeed he had been a mere trespasser, yet, if the allegations of the declaration be true, his administrator was entitled to recover.

All of the assignments of error, beginning with the second and running down to and including the eleventh, are without merit, and are not of sufficient interest to warrant a more particular discussion.

The twelfth assignment of error is to the action of the court in giving to the jury two instructions asked for by the plaintiff in the court below, which are as follows:

1. "The court instructs the jury that even though they may believe from the evidence that the plaintiff's decedent, Daniel I. Sollenberger, was guilty of negligence in lying on the railroad track and going to sleep thereon (if he was asleep), yet it became and was the duty of the defendant company, if it discovered his peril, or had such notice as would put a reasonably

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prudent man on the alert to discover his peril, and guard against injuring him, to then do all it could reasonably under the circumstances to prevent the accident.

2. "They are, therefore, further instructed, that if they believe from the evidence that any of the employees of the defendant company in charge of the defendant's train saw said Sollenberger on the track in front of said train, and discovered his peril, or had such notice as would put a reasonably prudent man on the alert to discover the same and guard against injury, and that any such employee failed thereafter to exercise reasonable diligence to prevent said injury, and that, but for such failure of such employee, the accident would not have happened, then they should find for the plaintiff."

These instructions embody the same principle of law stated in the second and third counts of the declaration, which we have already approved; so that this assignment of error is overruled.

The first instruction asked for by the plaintiff in error is that if the jury believe from the evidence "that the plaintiff's intestate, in order to enter the service of the defendant company, falsely represented that he was over twenty-one years of age, when he knew, or had good reason to know, that such statement was not true, and that the rules of the defendant forbade the employment of minors in its operating department, they must find a verdict for the defendant, unless the jury shall believe from the evidence that the injury complained of was recklessly, wantonly and wilfully inflicted upon him."

There was no error in the refusal of this instruction, under the facts of this case. As we have said, in treating of the demurrer to the declaration, if the injured man had been a mere trespasser, it was the duty of the railway company, after it discovered his position of peril, to do all within its power consistent with its other duties to prevent inflicting an injury upon him.

The second instruction asked for by plaintiff in error is as follows: "The court instructs the jury that even should they



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believe from the evidence that the injury to the deceased should, in the exercise of ordinary care, have been prevented after his peril was discovered by any member of the train crew in question, they should nevertheless find for the defendant if they further believe from the evidence that deceased, in lying down upon the track at the time of the injury, assumed a position of danger that was neither necessary nor proper for him to have assumed under the circumstances as a member of said train crew and an employee of the defendant company."

This instruction plainly comes within what was said with respect to the preceding instruction, and was properly rejected.

After the refusal of the court to give these two instructions the railway company asked that the jury be instructed as follows: "The court instructs the jury that if they believe from the evidence that plaintiff's intestate, D. I. Sollenberger, went to sleep upon defendant's railroad track at a place where defendant's trains ordinarily passed, and where the wreck train in question was expected to pass, and that such action of Sollenberger was one of the contributing causes of his injury, even though they may believe from the evidence that said Sollenberger had been without sleep for a considerable length of time, such action of Sollenberger constituted contributory negligence on his part, and that the jury cannot consider any negligence, if any such there was, on the part of the defendant company or its employees, that happened prior to the said negligent act of plaintiff's intestate, Sollenberger. In other words, if the belief of the jury is as above set forth, the only negligence for which they can hold the defendant liable is the negligence, if any, of the defendant subsequent to the time it discovered the perilous position of the said Sollenberger, if it did so discover the same."

The court, however, refused to give the instruction as asked for by the defendant, but modified and gave it, the modification consisting of adding to the instruction, as asked for, the words, "or had such notice, if it did have the same, as would put a reasonably prudent man on the alert to discover his peril and guard against injuring him."

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We are of opinion that the addition was proper, and that the instruction, as given, is a correct statement of the law.

This brings us to a consideration of the motion to set aside the verdict as contrary to the evidence.

Upon the occasion of the accident Sollenberger was in the employment of the Norfolk and Western Railway Company as a brakeman upon a wrecking train, which had been sent out to remove a wreck upon the line of its road near St. Paul's station. According to the testimony of Ludey, a witness for the defendant in error, who was wrecking foreman of the train in question, it consisted of a derrick car, a flat car, a tool car, and an engine, beginning at the west end. Then there were a flat car, a cook car, a dining car and a refrigerator car; the refrigerator car being on the extreme east end of the train, the derrick on the extreme west end, and the engine about in the middle. The engine was headed west, and was backing towards the east.

Sollenberger, the brakeman, had been sent down the line towards the east to flag an expected passenger train, and at the time of or immediately preceding the accident the wrecking train, with its engine headed west, was moving backward towards the east at a speed estimated at from eight to fifteen miles an hour. There was a curve in the track, which is described as being "a curve," "not so much of a curve," and "quite a bit of a curve." Ludey was on the tool car, a car built especially for the purpose of carrying tools. It was on the order of a box car, had a platform at each end, and was used for loading, blocking and other purposes. The witness was on the inner side of the curve, and could see past the other cars in the train to the point where Sollenberger was lying upon the track. He says: "When I first saw him I looked for a second or so; I could not see what it was at first. The thought struck me that it was a man there, and I went across to the other side of the tool car to see the engineer, and hollered at him and waved him down to stop. Then I went back again, and hollered at the man ahead on the track. When I come back I could see plain it was a

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man on the track. The train did not slack up, and I come back on that side again and hollered at him to stop, and waved him down all I could, and he did then stop; I went back again, and we were right close to him then. I saw him when he was struck by the car.

“Q. Approximately, how long did it take you, after you first saw the man on the track, to go across to the engineer’s side and give him the signal to stop? A. It did not take any longer than to take about two steps anywhere. I was on the level floor.

“Q. Did or not the engineer see your signal this time? A. I don’t think he did.

“Q. From your knowledge of railroads and trains, if he had obeyed your first signal, could he or not have stopped the train in time to have kept from running over the man on the track? A. Yes, he could have done that if he had stopped as soon as I gave him the first signal.”

Thos. Peak, a witness for the railway company, testified:

“Q. What was the first you noticed in regard to Ludey’s seeing the body on the track—seeing Sollenberger on the track? A. Hollering; he hollered.

“Q. What did you do when he hollered? A. I looked back west when he first hollered.

“Q. You did? A. Yes, sir; then looked east and seen the boy.

“Q. How far was the front end of the train, or rear end of the train, or rear end of the train as you were backing up, how far was the refrigerator car, the east end of the train, from Sollenberger?” (It will be remembered that the refrigerator car was on the extreme east end of the train.) A. “When I seen it!

“Q. Yes. A. About a car length and a half when I seen him.

“Q. You say you looked west first? A. Yes, sir.

“Q. When Ludey first hollered? A. Yes, sir.

“Q. How long after that before you looked east? A. Just as soon as I could turn my head the other way.

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"Q. What did you look west for? A. We was getting out of the way of 86, and I thought it was running into us, that was the reason I looked west.

"Q. How did Ludey holler? A. Why, he hollered pretty loud.

"Q. Well, how? A. He hollered 'Hey' pretty loud; that is just the way Ludey did, he could holler pretty loud, or stout voice.

"Q. How soon after he hollered was the air brake applied, or was it applied? A. Yes, sir; I could not say whether it was or not; didn't take much notice of it.

"Q. How soon after he hollered was the train stopped? A. It stopped in about half a minute or something like that, as near as I could guess at it.

"Q. Which way was the engineer facing before Ludey hollered? A. He was looking east before, just before he hollered."

William Trigg, a witness for plaintiff in the court below, was asked:

"Q. Were you on the wreck car at the time Dan Sollenberger got hurt? A. Yes, sir.

"Q. Where were you at the time of the accident, on that car? A. Between the dining car and the cook car.

"Q. Whereabouts between those cars were you standing? A. On that platform on the east end of the car.

"Q. In the middle of the platform? A. Standing on the edge.

"Q. Which edge? A. South side.

"Q. Just tell the jury what was the first you knew of the trouble? A. The first I knew of the trouble I hear someone holler, and I looked east and saw the man lying on the track, and I was about a car length from him; then I crossed over to the north side of the car and waved the engineer down.

"Q. Did he do anything to stop until you waved him down? A. I could not tell."

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The engineer, Hall, says, testifying for the railway company, that at the time of the accident his engine was headed west and was moving east; that he was on the right-hand side of his engine, and looking in the direction in which he was moving. In answer to the question, "State what occurred and what was the first intimation you had?" (of the trouble), he says: "I was backing up, and I heard a scream, or hollering, and the engine was working steam. I shut it off and asked my fireman if he heard anybody give a signal. I didn't hear anybody, and somebody waved me down on the wreck car, or cab, and I threw the brake in emergency, and stopped as quick as I could, and the boy was hurt when I stopped."

"Q. Did you see any signal from anyone on the derrick car west of you? A. No, sir."

"Q. Did you see any signal on any car west of you? A. No, sir."

"Q. State whether or not you applied your air in emergency as soon as you saw a signal to stop? A. Yes, sir; I did."

"Q. After the train had stopped, did you discover that this boy had been injured? A. Yes, sir."

Upon cross-examination, in answer to questions, he said:

"Q. You heard somebody holler, did you? A. Yes, sir."

"Q. And you shut off the steam? A. Yes, sir."

"Q. You could hear them holler? A. I could not hear what they said; I just heard a fuss."

"Q. You asked the fireman if he saw any signal? A. Yes, sir."

"Q. What was the fireman doing at the time? A. I don't remember."

"Q. Was he shoveling coal? A. Maybe he was; I could not say."

"Q. What made you stop the train? A. I saw a man wave me down out of the cab of the wreck car?"

"Q. Out of the cab of the wreck car? A. Window of the wreck train."

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“Q. What was the first signal you heard, hollering to stop?

A. I don't know; didn't know how it was.

“Q. Where did it come from? A. I don't know; I just heard the sound of a voice.

“Q. Hollering for you to stop? A. No, sir; I could not hear what he said, just could hear a yell.

“Q. You paid enough attention to shut off the steam, did you? A. Yes, sir.

“Q. How long after that was it that you saw this signal?

A. Well, very few seconds; I could not say how long it was.

“Q. Did you apply any sand? A. No.

“Q. You had sand on the engine? A. Yes, sir; but I was backing up.

“Q. I say you had sand on the engine? A. Yes, sir.

“Q. Did you reverse your engine? A. No, sir.

“Q. Give the engine steam? A. No, sir.

“Q. You just applied the air? A. Yes, sir.”

The witness further testified that it was a very usual thing for people to scream and “holler” at the train hands as they passed along the road, and that railroad business could not be conducted if the trains were stopped or halted upon every such occasion.

Some time after the accident a test train was made up to correspond with the wrecking train used at the time Sollenberger was killed. Counsel for plaintiff and defendant were present and numerous tests were made, and no doubt with the utmost fairness and integrity of purpose. But after all it is impossible to reproduce conditions as they actually existed. If it were possible to reproduce all of the physical conditions, as may be done in theory, but not in practice, the mental attitude of those engaged in the tests is necessarily wholly different. Every man engaged in the test knew from the beginning that in the actual occurrence there was a man upon the track exposed to imminent danger. The positions of the actors at a particular moment of time could not be determined with pre-

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cision; and upon the whole it seems to us that the case must, after all, be determined upon the evidence adduced before the jury by witnesses who were present upon the occasion of the accident, and who testified to what they saw and heard of the actual occurrence. It is oftentimes instructive to take a jury to the scene of an accident, in order to enable them more intelligently to appreciate the evidence adduced before them; but that is altogether different from what was done in this case.

That it was negligence upon the part of young Sollenberger to go to sleep upon the track, does not admit of question. If in truth he had been employed for forty-eight hours without sleep and without rest, it is difficult to conceive of an emergency which would justify the railway company in imposing so cruel a task upon one of its employees; but it was none the less contributory negligence on his part to fall asleep in a position of peril so constant and so imminent as upon a railroad track. His folly, or his misfortune, however, would not justify or excuse the railway company in inflicting the injury upon him, if it knew, or had such notice as would put a reasonably prudent man upon the alert to discover Sollenberger's peril and to guard against any injury to him.

If the verdict and judgment of the circuit court be sustained, it must rest upon the testimony of Ludey, the substance of which we have given in his own words. When he first saw the object upon the track, he was uncertain and looked at it for a second or two, and then the thought struck him that it was a man, and he crossed to the opposite side of the tool car on which he was and "hollered" to the engineer and waved him down; but he says, in answer to a question, "I don't think that the engineer saw that signal," and that, of course, deprives his opinion that the train could have been stopped in time if the first signal had been obeyed of all force and virtue. It will be remembered that he cried out—that he "hollered"—but that in itself is not a signal. It is not necessarily to be inferred from a

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man's crying out, where a number of men are engaged, that any one is in danger. The engineer says that when he heard Ludey "holler" he shut off the steam by way of precaution; that he did not stop his train because he had received no signal to stop, or any signal the natural tendency of which was to inform him that it was necessary to stop; that as soon as he did receive a signal to stop, when his train was waved down, as the expression is, he threw down the emergency brake and halted the train as soon as possible. Another witness, whose testimony we have quoted on behalf of the plaintiff in the court below, says that when he heard the scream, or in other words heard Ludey "holler," he looked and saw a man lying on the track, and that he was then about a car length and a half from him.

It is said that the engineer was derelict in not using sand. But it is to be remembered that we are dealing with small fractions of time; that we are dealing with an emergency suddenly thrust upon the engineer, and in which he was called upon to act with the utmost promptness; that the engine was moving at the rate of from eight to fifteen miles an hour; and that the train was close upon Sollenberger when Ludey gave the alarm; that in that time the engineer shut off the steam as a precautionary measure; and that as soon as he was waved down, which was the first signal given to stop, he applied the air brakes, and the accident occurred immediately thereafter. *Wise Terminal Co. v. McCormick*, 104 Va. 400, 51 S. E. 731.

Upon the whole case we are of opinion that the evidence does not show that the railway company or its employees failed to exercise reasonable diligence to prevent the injury complained of after it discovered Sollenberger's peril, or had such notice as would put a reasonably prudent man upon the alert to discover the same and to guard against the injury.

The judgment of the circuit court must be reversed, and the cause remanded for a new trial.



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Opinion.

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## UPON PETITION TO REHEAR.

KEITH, P.:

The defendant in error has filed a petition to rehear the judgment rendered on November 18, 1909 (66 S. E. 726), and in support of the petition shows that there was an error in the transcript of the record upon which the case was heard and decided.

A very important witness for the defendant in error, plaintiff in the court below, was one S. J. Ludey, who, in narrating what occurred when he first saw Sollenberger upon the track, stated in part as follows:

"Q. What did you think and what did you do when you first saw him on the track? A. Well, when I first saw him I looked for a second or two; I could not see what it was at first. The thought struck me that it was a man there, and I went across to the other side of the tool car to see the engineer, and hollered at him and waved him down to stop. Then I went back again, and hollered at the man ahead on the track. When I come back I could see plain it was a man on the track. The train did not slack up, and I come back on that side again and hollered at him to stop, and waved him down all I could, and he did then stop. I went back again, and we were right close to him then. I saw him when he was struck by the car.

"Q. Approximately, how long did it take you, after you first saw the man on the track, to go across to the engineer's side and give him the signal to stop? A. It did not take any longer than to take about two steps anywhere. I was on the level floor.

"Q. Did or not the engineer see your signal this time? A. I don't think he did.

From your knowledge of railroads and trains, if he obeyed your first signal, could he or not have stopped the train in time to have kept from running over the man on the track?

A. Yes, he could have done that if he had stopped as I gave him the first signal.

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“Q. I believe you said he did obey your second signal? A. Yes.

“Q. How far did the front part of your train pass over and beyond Sollenberger? A. It was something like about fifty-five feet I suppose.”

It is agreed between counsel that the above questions and answers are not complete, and (without undertaking to repeat the whole) that they should have read as follows: After the question “Did or not the engineer see your signal this time?” the answer should be “Yes”; then should follow the question, “Did he make any effort to stop or not?” A. “I don’t think he did.” In other words, the answer “Yes” to the question which precedes it, and the question which succeeds it, “Did he make any effort to stop or not?” were by some accident omitted from the record.

The pith of Ludey’s testimony is found in two expressions of opinion. “Did he (the engineer) make any effort to stop or not? A. I don’t think he did.” “Q. From your knowledge of railroads and trains, if he had obeyed your first signal, could he or not have stopped the train in time to have kept from running over the man on the track? A. Yes, he could have done that if he had stopped as soon as I gave him the first signal.”

It will be observed that Ludey does not state as a fact that the engineer did not make an effort to stop upon receiving the first signal. He says “I don’t think he did,” while the testimony of the engineer, who is corroborated by other witnesses, is that he was in his proper place on the right-hand side of the engine; that he was looking in the direction in which he was moving, which was toward the east; and in answer to the question “State what occurred, and what was the first intimation you had” of what occurred, he says: “I was backing up and I heard a scream or hollering, and the engine was working steam. I shut it off and asked my fireman if he heard anybody give a signal. I didn’t hear anybody, and somebody waved me down on the wreck car, or cab, and I throwed the brake in emer-

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gency, and stopped as quick as I could, and the boy was hurt when I stopped."

"Q. Did you see any signal from anyone on the derrick car west of you? A. No, sir.

"Q. Did you see any signal on any car west of you? A. No, sir.

"Q. State whether or not you applied your air in emergency as soon as you saw a signal to stop? A. Yes, sir; I did."

But let it be conceded that the engineer saw the signal, and that his receipt of the signal was not followed by any effort to stop. Let us examine the value of Ludey's opinion that the train could have been stopped in time to avoid the injury.

That opinion was, of course, conditioned upon the grade, the length and weight of the train, its speed, and the distance between the east end of the train and young Sollenberger when the signal was given. Of these conditions the speed of the train is not definitely ascertained, and the most important of them all was the intervening distance. That had been fixed by Ludey at 150 yards or 450 feet, and his opinion is to be taken as having been based upon that estimate. Before the trial was concluded the jury were taken to the scene of the accident, and all the conditions were reproduced as far as that could be done, with the result that it was admitted in the presence of the jury that Ludey was mistaken in his estimate of the distance between the east end of the train and Sollenberger when he first saw him on the track. It is probable that Ludey made his estimate of the distance, not from the east end of the train but from the point where he stood on a car which was to the west of the engine, which, it will be remembered, was in the center of the train. So that, from the estimate of the intervening distance as given by him there must be deducted the length of the train between the point where he stood and its eastern end. This would be about 246 feet, which deducted from 450 feet leaves 204 feet; or if taken from the 486 feet, which is the distance of what is known as "Bullitt's signal point" in the record, will leave 240 feet.

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It would require a liberal interpretation of the power, or, more properly speaking, the right of a jury to deduce inferences from testimony to hold that Ludey's statement when he was asked "Did the engineer make any effort to stop or not?" that "I don't think he did" would have warranted a verdict exonerating the defendant in error's intestate from the consequences of the gross contributory negligence established beyond question in this case, and the whole probative value of the opinion falls to the ground when it is made to appear that the witness was in error as to the most essential condition upon which that opinion was predicated.

All other questions presented in the petition have been already considered in the opinion heretofore filed, and the petition to rehear is denied.

Rehearing denied.

*Reversed.*

Syllabus.

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**Richmond.**

NORFOLK AND WESTERN RAILWAY CO. v. THOMAS, TRUSTEE,  
AND OTHERS.

January 13, 1910.

Absent, Buchanan, J.

1. EVIDENCE—*Comparing Methods of Work—Rebuttal—Railroads*—A defendant, who has made the plaintiff's witness his own on the subject of the best form of spark arrester, cannot object if the plaintiff, on re-examination, asks the witness whether or not the device used for arresting sparks by another company is preferable to that used by the defendant.
2. APPEAL AND ERROR—*Errors Corrected by Instructions—Harmless Error*.—If any prejudice which a party could have suffered by permitting a witness to answer an improper question was corrected in the trial court by a proper instruction to the jury, it is not the subject of complaint in this court.
3. RAILROADS—*Fires—Evidence—Number of Passing Trains*.—When the train which set fire to the plaintiff's house is not identified, and the train dispatcher of the defendant is on the stand as a witness for the defendant in an action to recover for the value of the house, it is entirely competent for the plaintiff to make him his witness for the purpose of showing what trains had passed the house at an opportune time for starting the fire.
4. RAILROADS—*Fires—Excessive Speed of Trains—Evidence—Time-tables Dated Five Years After Fire*.—In an action against a railroad company to recover for a loss occasioned by a fire set out by its engine in the year 1903, which was running at the rate of thirty-eight miles an hour, one of its time-tables for the year 1908, showing the maximum rate of speed of such trains to be thirty miles an hour, may be offered in evidence by the plaintiff as tending to show that the rate of thirty-eight miles an hour in 1903 was unreasonable and excessive, in the absence of evidence showing any change in the roadbed or traffic of the defendant since 1903, and when the time table of 1903 was inaccessible to the plaintiff. If the rules regulating the speed of trains in 1903 were in existence, they were in the possession of the defendant company, and could be produced by it.

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5. **DAMAGES—Value of Building Burned.**—The measure of damages for a house destroyed by a negligent fire is the value of the house at the time of its destruction.
6. **LACHES—Action Within Statutory Period—Evidence.**—If an action to recover for burning plaintiff's house be brought within the statutory period, the causes of delay in bringing and prosecuting the action, and the time at which an insurance company intervened to claim the recovery, if any, are irrelevant and immaterial on the issue of the defendant's liability for the burning.
7. **RAILROADS—Fires—Prima Facie Case for Plaintiff—Burden on Defendant.**—Where the evidence shows that a fire which destroyed a house could only have been caused by the passing engines of a railroad company, that there was no fire in the house and no other way of accounting for it, but the particular engine setting out the fire is not identified, and it may have been set by any one of four engines which passed the house at an opportune time for starting the fire, the railroad company is presumptively charged with negligence, and it has the burden of showing that each of the four engines was properly equipped and operated.
8. **RAILROADS—Fires—Prima Facie Case for Plaintiff—Proof Required of Defendant.**—In an action against a railroad company to recover the value of property destroyed by fire, when the plaintiff has made out a *prima facie* case that the fire was set out by sparks from an engine of the defendant, the burden is on the defendant to show that it had availed itself of all the best mechanical contrivances and inventions in known practical use for arresting sparks.
9. **RAILROADS—Fires—Dry Seasons—Greater Care.**—In an unusually dry season, when all inflammable material is very dry and liable to be set on fire by the smallest spark, and a wind is blowing from an engine toward wooden buildings or combustible material, greater care and caution are required of a railroad company in the operation of its trains than when these conditions do not exist.

Error to a judgment of the Circuit Court of Appomattox county in an action of trespass on the case. Judgment for the plaintiffs. Defendant assigns error.

*Affirmed.*

The opinion states the case.

Instruction 2 given at the instance of the plaintiffs was as follows:

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"The court instructs the jury that if they believe from the evidence that the plaintiffs' property in the declaration mentioned was set on fire by sparks from an engine or engines of the defendant company, that then the defendant company is presumptively chargeable with negligence and the burden is on it to prove that it had availed itself of all of the best mechanical contrivances and inventions in known practical use to prevent the burning of the plaintiff's property by the escape of fire, and had exercised and observed every reasonable precaution in selecting competent employees and in operating its trains and engines, and unless the jury believe from the evidence that the defendant company had availed itself of all the best mechanical contrivances and inventions in known practical use to prevent the burning of the plaintiffs' property by the escape of fire, and observed every reasonable precaution in selecting competent employees and in operating its trains and engines, they must find for the plaintiffs such damages as they may believe from the evidence the plaintiffs have sustained by reason of such fire.

"The court, however, instructs the jury that the law recognizes the fact that the skillful do not agree in the matter of instrumentalities and allows to every one using mechanical devices the freedom of action and judgment which must be an incident to such differences in judgment. The law does not permit a jury to condemn a device because some other person using a similar device prefers a different pattern." (Memorandum: The last clause of this instruction, beginning with "The court, however, instructs," etc., was added upon request of the defendant below.)

*Kirkpatrick*, for the plaintiff in error.

*& Ferguson* and *F. C. Moon*, for the defendants in

son, J., delivered the opinion of the court.

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This action was brought by the defendants in error to recover of the Norfolk and Western Railway Company damages for its alleged negligence in burning a dwelling house held by the plaintiff, J. O. Thomas, as trustee for his wife, which was occupied by the plaintiffs as their home. There was a verdict and judgment in favor of the plaintiffs, which this writ of error brings under review.

Objection is taken to the action of the circuit court in permitting J. I. Harvey, an engineer who had run on the Southern railway, to testify that the device for arresting sparks employed by the Southern railway was, in his opinion, preferable to that used by the defendant company; that it was easier to operate a train with the device used by the defendant, but that the device used by the Southern threw less fire.

The record shows that this witness was not introduced by the plaintiffs to speak as to the relative merits of different spark arresters, and was not asked upon his examination in chief to give any evidence on that subject. The plaintiff in error, on cross-examination, made the witness his own on the subject of the best form of spark arrester, and the question objected to, which was asked by the plaintiffs, was responsive to the evidence which the defendant had drawn out from its own witness. The defendant cannot now complain of evidence that it alone is responsible for. Moreover, if the defendant could have suffered any prejudice on this account, the harm was avoided, at its instance, by instruction No. 2, which fully guards the rights of the defendant in this respect by telling the jury "that the law recognizes the fact that the skillful do not agree in the matter of instrumentalities and allows every one using mechanical devices the freedom of action and judgment which must be an incident to such differences in judgment. The law does not permit a jury to condemn a device because some other person using a similar device prefers a different pattern."

It is further insisted that the court erred in allowing the witness, C. N. Abbott, to state that, after the use of a certain



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hopper in the front end of the locomotive was abandoned by the defendant, more sparks came out of the stack than escaped while the hopper was used. In answer to this contention it is only necessary to refer to what has been said with respect to the objection made to the evidence of the witness Harvey. What is there said is equally applicable here and need not be repeated.

It is further objected that it was error to require the train dispatcher to give evidence of the trains passing the plaintiffs' house other than the freight which the plaintiff, Thomas, had identified as causing the fire.

The record shows that there were four trains that passed the plaintiffs' home between the hours of twelve and one o'clock, the time being opportune for causing the fire. Thomas saw and mentioned one of these trains, but he did not identify the train he saw as the one that caused the fire. The records of the defendant company showed what trains passed the house and the time when each passed. When the train dispatcher was on the stand with this record before him, it was entirely competent for the plaintiffs to make him their witness for the purpose of showing what trains had passed the house at an opportune time for starting the fire. This was all that was done, and the objection was properly overruled.

It is further contended that it was error to permit the introduction of a time-table for the year 1908, in order to prove the speed allowed in 1903 when the fire occurred.

If the rules regulating the speed of trains in 1903 were in existence, they were in the possession of the defendant company and not accessible to the plaintiffs. The time-table of 1908 was not introduced to show the schedule speed of trains in 1903, but for the purpose of showing what the defendant regarded as a reasonable rate of speed in 1908, thereby tending to show what was a reasonable rate of speed in 1903. With the exception of an additional station, there was no evidence to show that any changed conditions in the roadbed or the traffic of the defendant had taken place since 1903 that would alter or affect the speed

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allowed for its trains, nor does any reason appear why a greater speed was permissible in 1903 than in 1908. The schedule of 1908 shows that thirty miles an hour was the maximum speed allowed for this class of trains in emergencies, and yet the evidence shows that the trains in question were making a speed of more than thirty-eight miles an hour. This tends to show that in 1903, at the time of the fire, the trains involved were running at an unreasonable and excessive speed. The tendency is to increase rather than diminish the speed of trains. The objection to the introduction of the schedule of 1908 was properly overruled.

It is further urged that the circuit court erred in refusing to give the first instruction asked for by the defendant, which was as follows: "The court instructs the jury that in considering the value of the house they must take in view its location, and if they believe from the evidence that the value of the house upon the farm was not such a sum as would replace it, the jury shall only award such a sum as the place has suffered by reason of its destruction."

This instruction is not clear and is misleading. The rule for measuring damages in this class of cases is, that the measure of recovery is the value of the property destroyed. *Norfolk & W. R. Co. v. Bohannon*, 85 Va. 293, 7 S. E. 236.

In the case cited the suit was to recover damages for the destruction by fire of an orchard. In passing upon an instruction in that case this court said: "The instruction given stated the rule in cases of this kind as well, perhaps, as it can be done, when it said that the measure of recovery is the value of the property destroyed."

In 33 Cyc., pp. 1391, 1392, citing numerous cases, the rule is stated as follows: "Where buildings are injured or destroyed it is ordinarily held that they are capable of a separate valuation, and that the measure of damages is the value of the property at the time of its destruction."

The instruction did not state the rule correctly and was properly refused.

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**Opinion.**

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It is contended that the court erred in refusing to give the second instruction asked for by the defendant, which tells the jury that if the defendant negligently caused the fire in question it is liable to the intervening petitioner, the Virginia Fire and Marine Insurance Company, to the extent of the insurance paid by it, but that in determining the defendant's liability to the insurance company the jury may consider the fact, if it be a fact, that for more than five years after the fire the insurance company made no demand upon the defendant for repayment of the loss occasioned it.

The record shows that the plaintiffs put their claim for the destruction of their property into the hands of their attorneys soon after the fire. The causes of the delay in bringing and prosecuting this suit are not material in this connection. The suit was brought within the statutory period. The insurance company has intervened in the suit, by petition, asking that it may be repaid its loss by the fire out of any damages the plaintiffs may recover, and the plaintiffs have agreed of record that the company shall be so paid. The time of its intervention does not appear, and cannot affect the right of the plaintiffs, through whom the company claims, to recover the value of the property destroyed. The instruction sought to introduce a wholly irrelevant issue that could only have confused and misled the jury. It was, therefore, properly refused.

Instruction Nos. 3 and 4, asked for by the defendant and refused are predicated upon the assumption that the plaintiffs had identified the local freight as the particular train that had caused the fire, and they announce the doctrine that where the negligent act may have arisen from one of two sources, for one of which the defendant was responsible and for the other it was not, the plaintiffs cannot recover.

The evidence shows that four trains of the defendant passed the scene of the fire within less than one hour. The fire may have originated from any one of these engines. As already stated, the evidence does not sustain the contention that the plain-

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tiffs had identified any particular engine as being responsible for the fire. The doctrine announced by these instructions has no application to the facts of this case. The evidence shows that the fire could only have been caused by the passing trains; there was none in the house and no other means of accounting for it. Under all the circumstances disclosed by the evidence the defendant was presumptively chargeable with negligence, and was obliged to assume the burden of showing that each of the four engines, either one of which may have caused the fire, was properly equipped and operated.

Where the particular locomotive which caused the fire is not identified the plaintiffs may show defects in the spark-arresting apparatus of any one of the defendant's engines which may have caused the fire; and the defendant may show that all of its engines passing on the day of the fire were properly equipped. Enc. of Ev., Vol. 10, p. 545; *N. & W. Ry. Co. v. Perrow*, 101 Va. 345, 43 S. E. 614.

The case of *C. & O. Ry. Co. v. Heath*, 103 Va. 67, 48 S. E. 508, cited by defendant, has no bearing upon the facts of this case. There a mill near the railroad, operated by a steam engine, was burned at night. The evidence did not show whether the fire arose from the engine which ran the mill or from a passing engine of the railway company. Under those circumstances it was held that no liability was fastened upon the company.

Objection is taken to instruction No. 2 given by the court. The chief objection urged to this instruction is that in laying down the law touching the burden of proof the following language is employed: ". . . and the burden is on the defendant to prove that it had availed itself of all the best mechanical contrivances and inventions in known practical use."

This court has stated the law in the language objected to, in numerous cases involving the destruction of property by fire from railroad engines. *Brighthope Ry. Co. v. Rogers*, 76 Va. 443;

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*Patteson v. C. & O. Ry. Co.*, 94 Va. 16, 26 S. E. 393; *Kimball, Receiver v. Borden*, 97 Va. 477, 34 S. E. 46; *White v. N. Y. Ry. Co.*, 99 Va. 357, 38 S. E. 180; *N. & W. Ry. Co. v. Fritz*, 103 Va. 687, 49 S. E. 971, 106 Am. St. Rep. 911, 68 L. R. A. 864. Moreover, if the language objected to had been improper, no prejudice could have resulted to the defendant therefrom, in view of the addition to this instruction which was made at its instance. This addition has been already quoted in connection with our consideration of the first assignment of error and need not be repeated here. Taking the instruction as a whole, it was a clear statement of the law applicable to the facts of the case, and, therefore, properly given.

The third instruction given by the court is made the subject of objection. This instruction tells the jury that when the doing of any particular act is attended with unusual hazards, unusual care must be exercised, but when the performance of the act is attended with only ordinary hazards, a less degree of care is required; that in proportion as the hazards increase there should be a corresponding increase in the care exercised; that in an unusually dry season when all inflammable material is very dry and liable to be set on fire from the smallest spark, and the wind is blowing from an engine toward wooden buildings or combustible material, greater care and caution are required than when these conditions do not exist.

These well settled principles were applicable to the fact of the case, and the objection to the instruction is without merit. *N. & W. Ry. Co. v. Fritz, supra.*

Finally it is insisted that the court erred in refusing to set the verdict aside, and in giving judgment thereon for the plaintiffs.

It is only necessary to say, with respect to this assignment of error, that a careful examination of the record shows that the verdict of the jury is fully sustained by the evidence, and that no error was committed by the court which would justify a reversal of the judgment; and, therefore, it is affirmed.

*Affirmed.*

**Syllabus.**

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**Richmond.**

**NORFOLK AND WESTERN RAILWAY COMPANY v. VIRGINIAN  
RAILWAY COMPANY.**

January 13, 1910.

Absent, Buchanan, J.

1. **EMINENT DOMAIN—*Railroads—Crossing Each Other—Regulation—Code, Sec. 1294b, Clause 3.***—The right of one railroad company to cross the track of another is specifically given, and the terms and conditions under which the right to cross is to be made effectual are prescribed by paragraph 3 of section 1294b of the Code. This paragraph is clear and unambiguous in its terms, and deals fully and completely with the subject. It was enacted several months after paragraph 52 of section 1105e of the Code, which relates to the condemnation of the fee, and while the two paragraphs must be construed so as to harmonize, if possible, yet if there be any repugnancy between them, the general must yield to the specific, and the earlier to the later expression of the legislative will.
2. **EMINENT DOMAIN—*Railroads—Crossing Each Other—Compensation—Due Process—Equal Protection—Impairment of Contract.***—An order in a condemnation proceeding, where one railroad company is seeking to cross the track of another, which directs the commissioners appointed to ascertain the proper compensation for damages, including the easement of crossing, which should be paid by the crossing company, is sufficiently broad to embrace all subjects of compensation arising out of the crossing of the right of way which is crossed; and the tribunal provided by the statutes of this State in such case, and the proceedings before it authorized by law, constitute due process of law, and the taking of property by such method cannot be said to deny the equal protection of the laws, nor to constitute the impairment of the obligation of any contract between the State and the company whose right of way is crossed as evidence by its charter and the charters of its predecessors in title.
3. **POWERS GIVEN TO SEVERAL—*Majority to Act—Common Law Rule—Statutes.***—At common law, where several persons are authorized

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to do any act of a public nature they must all deliberate, though a majority may decide, and the common law is not to be considered as altered or changed by statute unless the legislative intent is plainly manifested.

4. EMINENT DOMAIN—*Commissioners—Power of Majority—Disagreement—Statutory Rule of Construction.*—Where five commissioners appointed in condemnation proceedings, any three or more of whom may act, are all duly sworn and act, a report concurred in by four of them is all that is necessary to enable the court to take action and proceed with the case. The disagreement of the commissioners referred to in paragraph 10 of section 1105f of the Code, when read in connection with paragraph 6 of that section, has reference to a failure to agree on the part of that number of commissioners who are authorized to make a report. If there were any doubt about this construction, it is set at rest by paragraph 3 of section 5 of the Code, declaring that "words purporting to give authority to three or more public officers or other persons, shall be construed as giving such authority to a majority of such officers or other persons, unless it shall be otherwise expressly declared in the law giving the authority."
5. EMINENT DOMAIN—*Inadequate Damages—Case at Bar.*—The sum awarded as damages by the commissioners in this cause is not so inadequate as to justify this court in reversing the judgment of the trial court for that cause only.
6. EMINENT DOMAIN—*Admissions Not Laid Before Commissioners—Exceptions to Report.*—An extract from the brief of counsel of a party, in the nature of an admission of the damages for which his client is liable, and which was filed in another controversy between the client and the present defendant, cannot be filed for the first time on the hearing of exceptions to the report of the commissioners in a condemnation proceeding. If the extract was of any probative value it should have been brought to the attention of the commissioners while they were engaged in ascertaining the damages to be awarded.

Error to a judgment of the Circuit Court of Norfolk county in a condemnation proceeding. Judgment for the petitioner. Defendant assigns error.

*Affirmed.*

The petition for the appointment of commissioners was in the following words and figures:

Statement.

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*Petition.*

"To the Hon. Wm. N. Portlock, Judge of the Circuit Court of Norfolk county:

"The Tidewater Railway Company, a corporation duly existing under the laws of the State of Virginia, respectfully shows unto your honor the following case:

"First. That it has duly located the main line of its railroad from the West Virginia line through Virginia, to a point in Norfolk county on the Eastern branch of the Elizabeth river, and said line, as so located, crosses the line of the Norfolk and Western Railway Company in the county of Norfolk between the Eastern and Southern branches of the Elizabeth river near what is known as South Norfolk, and as more definitely hereinafter described, and that it is constructing its whole line from West Virginia to said Eastern branch, and has graded and is ready to lay its rails on each side of the proposed crossing.

"Second. That on May 23, 1905, Raymond Dupuy, general manager of the Tidewater Railway Company, submitted plans, specifications, appliances and methods of operation for the Tidewater Railway Company's crossing of the Norfolk and Western Railway near South Norfolk, to N. D. Maher, general manager of the Norfolk and Western Railway Company. A duly certified copy of the notice submitting said plans, etc., and a duly certified copy of the plans, specifications, appliances and methods of operation are hereto annexed, marked 'Exhibit A,' and prayed to be taken as a part hereof.

"Third. The Norfolk and Western Railway Company applied to the State Corporation Commission on the 20th day of June, 1905, to inquire into the necessity for such crossing and the propriety of the proposed location, in accordance with the statute in such case made and provided.

"Fourth. The State Corporation Commission on the 2d day of August, 1905, entered an order allowing the Tidewater Railway Company to cross the Norfolk and Western Railway at the



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point indicated in the said notice, dated the 23d day of May, 1905, above referred to, said place of crossing being described in said order as follows:

“ ‘Near South Norfolk, in Norfolk county, Virginia, at station 623 plus 86 of the Tidewater Railway, as located and about 800 feet south of the tower at the beginning of the double track of the Norfolk and Western Railway Company running towards Norfolk, the said crossing to be on the grade of the Norfolk and Western Railway at the point of crossing.’ A duly certified copy of which order of the State Corporation Commission, together with a duly certified copy of the memorandum of conclusions reached by the Commission, are hereto annexed, marked ‘Exhibit B,’ and prayed to be taken as a part hereof.

“Fifth. The Norfolk and Western Railway Company appealed to the Supreme Court of Appeals of Virginia from the order of the State Corporation Commission, and the said Court of Appeals affirmed the order of the State Corporation Commission, by its order entered on the 1st day of March, 1906, and certified the same to the State Corporation Commission, a certified copy of which order of the Court of Appeals is hereto annexed, marked ‘Exhibit C,’ and prayed to be taken as a part hereof.

“Sixth. Your petitioner avers that, by the proceedings aforesaid, it has acquired a right or easement of crossing with its track the track and right of way of the Norfolk and Western Railway Company at the point aforesaid, the said crossing to be constructed, maintained and operated by your petitioner in accordance with the said order of the Corporation Commission, subject only to the payment to the Norfolk and Western Railway Company of proper compensation for damages for said crossing, as provided by the statute in such case made and provided.

Seventh. The said crossing is wanted by your petitioner for its uses and purposes as a railroad corporation, and it prays to construct, maintain and operate the said crossing under

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**Statement.**

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the plans and specifications, with the appliances and according to the methods required by the said order of the Corporation Commission. Your petitioner cannot agree with the Norfolk and Western Railway Company on the amount of compensation the last mentioned company is entitled to on account of said crossing. Your petitioner has offered to pay said Norfolk and Western Railway Company the sum of \$——, which it has refused to accept. Your petitioner therefore, in accordance with the statute in such case made and provided, has instituted these proceedings in order that the proper compensation for damages to which the said Norfolk and Western Railway Company is entitled may be determined as provided by law. A plat of the survey, with profile and description of the crossing, and memorandum showing the name and principal office of the owner of the land covered by the crossing, is attached hereto and herewith filed in the office of the clerk of the Circuit Court of Norfolk county and prayed to be taken as a part of this petition.

“Your petitioner therefore prays that five disinterested freeholders, residents in Norfolk county, be appointed by the court for the purpose of ascertaining the proper compensation for damages, including compensation for the easement of crossing, which should be paid by the Tidewater Railway Company in accordance with the statute in such case made and provided.”

The following sections of the Code are referred to in the opinion of the court:

Sec. 1105e, par. 52, “No corporation shall take by condemnation proceedings any property belonging to any other corporation possessing the power of eminent domain, unless, after hearing all parties in interest, the State Corporation Commission shall certify that a public necessity, or that an essential public convenience shall so require, and shall give its permission thereto; and in no event shall one corporation take by condemnation proceedings any property owned by and essential to the purposes of another corporation possessing the power of eminent domain.”

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Statement.

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Sec. 1294b, par. 3. "If any railroad, canal, turnpike, or other public service corporation deems it necessary in the construction of its works to cross any other railroad, canal, turnpike, or works of any other public service corporation, or any county road, it may do so: provided, such crossing shall be so located, constructed, and operated as not to impair, impede, or obstruct in any material degree, the works and operations of the railroad, canal, turnpike, or other works, to be crossed: and provided, such crossing shall be supported by such permanent and proper structures and fixtures, and shall be controlled by such customary and approved appliances, methods, and regulations as will best secure the safe passage and transportation of persons and property along such crossing, and will not be injurious to the works of the company to be crossed. The cost of such crossings, their appliances and apparatus and of the repair and operation of the same, shall be borne by the party desiring to make the crossing. Before the work is commenced upon the crossing the president or general managing officer of the company which proposes to cross the works of another company shall submit plans, specifications, appliances, and methods of operation to the president or other general officer of the latter company; and if the said plans and specifications are not accepted within thirty days after the same have been delivered to the president, or any general officer of the company whose works are to be crossed, the president or general managing officer of the first-named company may then proceed with the construction and operation of the said crossing under the plans and specifications, and with the appliances and methods, so submitted: provided, however, the president or general managing officer of the company whose works are to be crossed may, within fifteen days from the date of the service of such notice, apply to the State Corporation Commission to inquire into the necessity for such crossing, and the propriety of the proposed location, and all matters pertaining to its construction and operation; and thereupon, within thirty days after the date of the service of the first notice aforesaid the State

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Corporation Commission in its discretion may, by notice served upon both companies, suspend work on said crossing for such reasonable time, prescribed in said notice, as it may deem necessary to make such inquiry. The said State Corporation Commission may, in its discretion, where railroads or canals are to be crossed by other railroads or canals, employ expert engineers, at a cost not exceeding five hundred dollars, to be paid equally by both companies, who shall, with the State Corporation Commission, or some member thereof, or such person as the said commission may designate, examine the location, plans, specifications, appliances, and methods proposed to be employed, and shall hear any objections and consider any modifications that the company whose line is to be crossed desires to offer, and within such time as the State Corporation [Commission] may fix shall reject, approve, or modify the said plans and specifications, which shall, unless an appeal be taken to the Supreme Court of Appeals within thirty days from the date of the final order of said commission, be final and binding on both companies. If any such company desires that the course of any other railroad, turnpike, canal, or other works shall be changed to avoid the necessity of any crossing, or frequent crossings of the same, the change may be made in such manner and on such terms as may be agreed on by the company desiring the change, and the company, person, or county owning or having charge of the works to be affected by such change. If any such crossing or change as is provided in this section cause damage to the works of any company, or of any county, or to the owner or occupant of any lands, the company exercising the privileges herein granted shall make proper compensation for such damage. Upon the failure of the company desiring to make the crossing to receive notice of the acceptance of the said plans and specifications within thirty days from giving the notice aforesaid, or upon the adoption of the plans, appliances, and methods by the State Corporation Commission, or if an appeal be taken as aforesaid, upon the adoption by the Supreme Court of Ap-

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peals of the plans, appliances, and methods, and the payment of the proper compensation for damages by the company desiring to cross the works of another company, such damages to be ascertained according to the laws regulating the exercise of the right of eminent domain, work may be commenced immediately, and no order shall be made, and no injunction awarded by any court or judge to stay the proceedings or prosecution of the work; but any county road, or stream, or water-course, may be altered by any such company for the purposes aforesaid whenever it shall have made an equally convenient road or waterway in lieu thereof, the said company having first obtained the consent of the board of supervisors of the county, to the alteration of any road or highway.”

*Hughes & Little, and Munford, Hunton, Williams & Anderson, Lucian H. Cocke, and Joseph I. Doran, for the plaintiff in error.*

*Loyall, Taylor & White and Brown, Jackson & Knight, for the defendant in error.*

KEITH, P., delivered the opinion of the court.

The Norfolk and Western Railway Company instituted a proceeding against the Tidewater Railway Company, which is now the Virginian Railway Company, before the State Corporation Commission, to inquire into the necessity for and propriety of the location of a crossing which the latter company desired to make over the works of the former; the principal contention on the part of the Norfolk and Western Railway Company being that the Tidewater Railway Company should not be permitted to cross what is known as the “throat” of its railroad yards at grade, but should be required to construct an overhead crossing. The Corporation Commission was of opinion that, the topography of the situation and all the other facts bearing upon the

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subject being considered, it would be unreasonable to require an overhead crossing, and so decided. From that order an appeal was taken to this court, where it was affirmed by an opinion handed down on March 1, 1906. See *N. & W. Ry. Co. v. Tidewater Ry. Co.*, 105 Va. 129, 52 S. E. 852.

The only question involved in that case was as to the necessity for and the propriety of the crossing which the Tidewater Railway Company proposed to make, and nothing was decided and nothing could have been decided except to "determine the necessity for the proposed crossing and the place where and the manner in which it should be made." "Until those questions were finally settled," said Judge Buchanan in his opinion, "no question of taking property, with or without due process of law, or of condemning the lands of the road whose works were to be crossed, or of compensation therefor, could arise."

Shortly after that case was disposed of by the judgment of this court, the Tidewater Railway Company filed its petition before the judge of the Circuit Court of Norfolk county, in which it states that it had, on the 23d of May, 1905, through its general manager, submitted plans, specifications, appliances and methods of operation for its crossing of the Norfolk and Western Railway near South Norfolk to the general manager of the Norfolk and Western Railway Company. The petition then recites in brief the proceeding instituted by the Norfolk and Western Railway Company before the State Corporation Commission, to which we have already referred, and the order of the commission subsequently affirmed by this court, authorizing the crossing to be made at a point "near South Norfolk, in Norfolk county, Virginia, at station 623 plus 86 of the Tidewater railway, as located, and about 800 feet south of the tower at the beginning of the double track of the Norfolk and Western Railway Company running towards Norfolk, the said crossing to be on the grade of the Norfolk and Western railway at the point of crossing." The petition then shows that the crossing is wanted by the Tidewater Railway Company for its

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uses and purposes as a railroad corporation, and that it proposes to construct, maintain and operate the crossing under the plans and specifications, with the appliances and according to the methods required by the order of the State Corporation Commission; that it has been unable to agree with the Norfolk and Western Railway Company upon the amount of compensation to which it is entitled on account of said crossing; and that the petitioner, therefore, in accordance with the statute in such case made and provided, has instituted these proceedings in order that the proper compensation for damages to which the Norfolk and Western Railway Company is entitled may be determined as provided by law. The petitioner, therefore, prays that five disinterested freeholders, residents in Norfolk county, be appointed by the court for the purpose of ascertaining the proper compensation for damages, including compensation for the easement of crossing, which should be paid by the Tidewater Railway Company in accordance with the statute in such case made and provided." Along with this petition are filed plats and surveys, and a statement showing the specifications, appliances and methods of operation of the proposed crossing.

The Norfolk and Western Railway Company appeared and filed its demurrer to this petition, and a motion to quash—"First, because the petition does not aver that petitioner has applied to the State Corporation Commission for permission to take by condemnation proceedings any of this respondent's property, or that the said commission has certified that a public necessity or an essential public convenience so required; second, because until the said State Corporation Commission has so certified, the petitioner cannot condemn the easement of crossing the property of this respondent; third, because there is nothing in said petition to show that the property owned by respondent, so proposed to be taken, is not essential to its purposes; fourth, because the statutes of Virginia in relation to the crossing of one railroad by another, if intended to authorize a mere assessment of incidental damages and not a payment for the property of respondent-



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ent proposed to be actually occupied and used by petitioner, are unconstitutional and void (1) as taking private property without just compensation; (2) as depriving respondent of its property without due process of law; (3) as denying to respondent the equal protection of the laws; (4) as impairing the obligation of the contract between the State and respondent, evidenced by its charter and the charters of its predecessors in title; (5) because the petitioner does not show the character or amount of interest or estate intended to be taken, or for which damages are to be assessed."

The court overruled the demurer and the motion to quash, and the Norfolk and Western Railway Company was permitted to file its answer; and thereupon the court appointed five commissioners to ascertain "the proper compensation for damages, including the easement of crossing, which should be paid by the Tidewater Railway Company on account of its crossing the Norfolk and Western Railway Company."

All five of the commissioners acted, and a report was returned, in which four of them concurred, that the sum of \$1,000 is a proper compensation for the easement of crossing, and \$2,500 is a proper compensation for damages to the works of the Norfolk and Western Railway Company on account of the Tidewater Railway Company crossing the said Norfolk and Western Railway Company, as set forth in these proceedings.

The Norfolk and Western Railway Company excepted to this report as follows: "It appears from the records in this case that all five commissioners were sworn, and that all five took part in the deliberations throughout, and that only four of the commissioners signed said report, and that W. B. Carney, the other commissioner, signed a paper reporting his inability to agree with the other commissioners; hence the said Norfolk and Western Railway Company excepts on the ground that the said report is no report at all, and that it shows a disagreement of the commissioners, consent of all being necessary to a report; and that the two papers taken together are, in legal effect, nothing



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more than a report of disagreement; the estimate of damages by four of the five commissioners being mere surplusage and unauthorized. Second, in that the said report, if a report, does not properly and accurately describe the exact amount of land of the Norfolk and Western Railway Company proposed to be occupied by the Tidewater Railway Company in its easement of crossing, neither the length nor breadth of the land so proposed to be occupied being given and no adequate description thereof being given. Third, in that the amount of damages awarded by the report, if a report, is grossly inadequate and unfair, it having been shown by the evidence the damages from delays incident to the stopping of the Norfolk and Western trains, in loss of time, in wear and tear of machinery, in increased use of train supplies and other delays and inconveniences, and from the injury to the yard of this exceptant were very large, amounting approximately to two hundred and sixty-five thousand dollars."

All of these exceptions were overruled by the circuit court and a judgment entered confirming the report, to which a writ of error was awarded.

The first error assigned is that the court erred in overruling the demurrer and motion to quash, and in not sustaining each of the five grounds therein specified.

Plaintiff in error relies in support of its demurrer upon paragraph 52 of section 1105e of the Code, which provides, that "No corporation shall take by condemnation proceedings any property belonging to any other corporation possessing the power of eminent domain, unless, after hearing all parties in interest, the State Corporation Commission shall certify that a public necessity or that an essential public convenience shall so require, and shall give its permission thereto. . . ."

On behalf of the defendant in error it is contended that this question is controlled by paragraph 3 of section 1294b of the Code; and that view we think rightly prevailed in the circuit court. The two sections are not dealing with precisely the same

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subject. Paragraph 52 of section 1105e has reference to a condemnation proceeding under which, by force of the power of eminent domain, it is intended to condemn and take a fee simple interest in property belonging to another corporation. If the contention of the Norfolk and Western Railway Company be true in all its parts, then there would be no power anywhere to grant to one railroad corporation possessing the power of eminent domain the right to cross the track of another corporation possessing the same power.

The contention of the plaintiff in error is that the crossing of the track of one railroad company by the track of another railroad company is the taking of property; and in a sense that is doubtless true—it is taking the easement of the right to cross, and for that taking just compensation must be made. But if it were a taking of property in the sense that it was a condemnation of a fee simple interest in the roadbed and track of the road to be crossed at the point of crossing, then it would be expressly prohibited by the second clause of the paragraph under consideration, which provides that “in no event shall one corporation take by condemnation proceedings any property owned by and essential to the purposes of another corporation possessing the power of eminent domain.” The railroad bed and its tracks, in all their parts, come strictly within the terms of this inhibition, as property owned by and essential to the purposes of a railroad corporation. To harmonize the two statutes, therefore, it is apparent that paragraph 52 cannot be held to relate to or control the crossing of the tracks of one railroad company by another.

Paragraph 3 of section 1294b provides that “if any railroad, canal, turnpike or other public service corporation deems it necessary in the construction of its works to cross any other railroad, canal, turnpike or works of any other public service corporation, or any county road, it may do so. . . .” Here is an absolute right given; and the paragraph then proceeds with great care and caution to provide the terms and conditions upon

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which the right to cross is to be made effectual. We need not discuss this section further, for this branch of the case has been sufficiently covered by the proceedings before the Corporation Commission, which have been already adverted to.

It is proper to remark before leaving this branch of the case that the conclusion at which we have arrived by a consideration of the terms of paragraph 52 is greatly strengthened by the fact that it was passed May 21, 1903, while paragraph 3 of section 1294b became a law some months thereafter; that the latter act is clear and unambiguous in its terms, deals fully and completely with the subject; and if there be any repugnancy between the two, the general must yield to the specific, and the earlier to the later expression of legislative will.

After treating the subject with much detail, paragraph 3 of section 1294-b provides for "proper compensation for damages by the company desiring to cross the works of another company, such damages to be ascertained according to the laws regulating the exercise of the right of eminent domain."

The commissioners appointed by the court were directed to ascertain the proper compensation for damages, including the easement of crossing, which should be paid by the Tidewater Railway Company on account of its crossing the Norfolk and Western Railway Company, as set forth in the order of the State Corporation Commission; and in obedience to that order the commissioners reported and the court allowed the sum of \$3,500. The order of the court was sufficiently broad to embrace all just subjects of compensation arising out of the crossing of the right of way of the Norfolk and Western Railway Company, and we think the tribunal provided and the proceedings before it authorized by law constitute due process of law, and that to take property by such method cannot be said to deny the equal protection of the laws, nor to constitute the impairment of the obligation of any contract between the State and the Norfolk and Western Railway Company as evidenced by its charter and the charters of its predecessors in title.

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We shall, therefore, proceed to inquire, first, whether the report of four out of five commissioners who may be appointed, and all of whom have acted, is such a report as is contemplated by our statute; and, second, whether or not the compensation allowed is to be deemed so grossly inadequate as to justify this court in setting it aside.

The commissioners in this case were appointed pursuant to the terms of paragraph 6 of section 1105f of the Code, which declares that when the provisions of the preceding sections (which need not be specifically mentioned here) have been complied with, the court of the county or corporation in which the land or other property sought to be condemned, or the greater part thereof, lies "shall appoint five disinterested freeholders, resident in such county or city, any three or more of whom may act, for the purpose of ascertaining a just compensation for such lands or other property, or for such interest or estate therein, and awarding the damages, if any, resulting to the adjacent or other property of the owner, or to the property of any other person, beyond the peculiar benefits that will accrue to such properties, respectively, from the construction and operation of the company's work. . . ."

Paragraph 3 of section 5 of the Code provides that "words purporting to give authority to three or more public officers or other persons, shall be construed as giving such authority to a majority of such officers or other persons, unless it shall be otherwise expressly declared in the law giving the authority."

The contention of plaintiff in error is that, in this case, as five commissioners were appointed, all of whom were duly sworn and acted as commissioners, no lawful report could be made unless all five of them united in the report; and that as one of them dissented or disagreed there was in contemplation of law no report upon which the court could take action.

It is conceded that the common law upon the subject is correctly stated in section 419 of the second edition of Lewis on Em. Domain. "It is a general rule of law that where several

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persons are authorized to do any act of a public nature they must all deliberate, though a majority may decide. In the absence of any statutory provisions controlling the matter, it follows that commissioners and similar bodies must meet and deliberate together concerning the matters submitted to their decision, and that, having done so, a decision of the majority will be valid and binding."

Leaving out of view, for a moment, the statute on construction above quoted, it has been frequently decided by this court, and may be taken as established law with us, that the common law is not to be considered as altered or changed by statute unless the legislative intent be plainly manifested (*Millhiser v. Gallego Mills Co.*, 101 Va. 579, 44 S. E. 760), and counsel for plaintiff in error contend that reading all of the statutes upon the subject together it is plainly made to appear that the law of this State contemplates a unanimous report from all of the commissioners who acted.

Much reliance is placed upon paragraph 10 of section 1105f, which provides: "If, however, good cause be shown against the report, or if the commissioners report their disagreement, or if they fail to report within a reasonable time, not to exceed ninety days, the court may, without further notice, as often as seems to it proper, appoint other commissioners, and the matter may be proceeded in as before prescribed."

It is earnestly argued that if four of the commissioners agree upon a report, and the fifth does not agree with the four, the disagreement contemplated by paragraph 10 exists, and the court must appoint other commissioners.

We are of opinion that the disagreement referred to in this paragraph, read in connection with paragraph 6, has reference to a failure to agree on the part of that number of commissioners who are authorized to make a report. That would seem to be the natural conclusion, construing these statutes and the rule of the common law upon the subject; but when we come to apply the rule of construction prescribed by paragraph 3 of section 5

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already quoted, all doubt would seem to be removed. The law giving the authority here is paragraph 6 of section 1105f, which provides for the appointment of five disinterested freeholders, any three or more of whom may act, and that, according to the statutory rule of construction, confers the power upon a majority of those acting, unless it shall be otherwise expressly declared in the law giving the authority. Now "expressly" means "in direct terms" (Webster's Dict.), and there is no room to argue that section 1105, paragraph 6, expressly, or in direct terms, requires unanimity upon the part of all of the commissioners appointed and acting. Ingenious argument will not do. Decisions rendered in other jurisdictions upon statutes more or less similar, but not identical in terms with our own, cannot control the plain and unambiguous terms of our statute law.

We are of opinion that this assignment of error cannot be maintained.

We do not think it necessary to add to what has already been said in dealing with the demurrer and motion to quash, with respect to the exception to the report, that it does not describe with sufficient accuracy "the amount of land of the Norfolk and Western Railway Company proposed to be occupied by the Tidewater Railway Company in its easement of crossing, neither the length nor breadth of the land so proposed to be occupied being given and no adequate description thereof being given."

We are further of opinion that in the absence of some error of law, and confining ourselves to the consideration of the facts bearing upon the subject of compensation, we are unable to say that the sum awarded by the commissioners is so inadequate as to justify us in reversing the judgment of the circuit court. This position, we understand, is not seriously controverted by counsel for plaintiff in error, but their contention is that the court did commit error for which its judgment should be reversed in the following particulars, as set forth in bill of exception No. 2:

"Be it remembered that on the first hearing of the exceptions

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filed by the Norfolk and Western Railway Company to the paper signed by four of the five commissioners to assess damages, and purporting to be an assessment of damages, said hearing having occurred on November 20, 1906, counsel for the Norfolk and Western Railway Company offered in evidence two extracts from the printed brief of the Tidewater Railway Company before the Corporation Commission at the hearing of the aforesaid commission on the subject of the character of the crossing, whether overhead or otherwise, which extracts are in the following language:

1. " 'The extra expense, if any, of such change of the yard, if the order of this commission should necessitate such change, the Tidewater Company would, under the statute, have to pay and would cheerfully pay; and

2. " 'And the Tidewater Railway Company expects to, and must pay all damages resulting from a grade crossing, and the Norfolk and Western Railway Company will be thereby made whole.' "

It will be observed that these two extracts, whatever may be their probative value, were not offered in evidence before the commissioners appointed to ascertain the damages, but were sought to be introduced before the circuit court upon the first hearing of the exceptions to the report of the four commissioners. If these two extracts had any evidential value, they should have been brought to the attention of the commissioners while they were engaged in ascertaining the damages to be awarded. Indeed, the second of these extracts is but a statement of what

urt had by its order required the commissioners to the damages resulting from a grade crossing, and the railroad yard of the Norfolk and Western was result of the grade crossing, the extra expense incurred would have been embraced in the order under which oners acted, to ascertain the proper compensation including the easement of crossing, suffered by the Western Railway Company.

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We find nothing in the action of the court, as set bill of exception, to justify our departure from the governing the judgments of courts which confirm commissioners to ascertain damages.

Upon the whole case we find no error in the judgment of the circuit court, which is affirmed.



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**Syllabus.**

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**Richmond.**

**STANDARD PEANUT CO. v. WILSON.**

January 14, 1909.

Reheard January 13, 1910.

1. **BILLS OF EXCEPTION—Time of Filing—Record Evidence—Code, Section 3385—Mandatory Provisions.**—Section 3385 of the Code, with reference to filing bills of exception, is mandatory, and unless the record shows affirmatively that bills of exception were signed in accordance with its provisions they do not constitute part of the record. The clerk has no authority to make them a part of the record, nor does the mere copying by him of unauthenticated bills have that effect. Where time has been given beyond the term for filing a bill of exception, the record must show affirmatively that it was filed within the time limited. In the case at bar, the record is silent as to which, if any, of the statutory requirements have been complied with, and the bills are not dated, and cannot be considered as parts of the record.
  2. **BILLS OF EXCEPTION—Record Evidence of Signing—Parol Evidence—Insertions by Clerk.**—While the statute declares that as soon as a bill of exception is signed by the judge it "shall be a part of the record of the case," still it must appear from the record itself when the bill of exception was signed and thereby made a part of the record. That fact cannot be made to depend upon parol evidence. Neither parol evidence, nor custom, nor long practice in a particular court will avail to add to or take from the record made under the supervision of the trial judge. A statement by the clerk which is no part of the final order in a cause and is authorized by the trial judge, but which is inserted by him in making up the record for this court that "the bills of exception referred to in the foregoing order are in the words and to-wit" is no part of the record.
- OF EXCEPTION—Jurisdiction to Sign—Record Evidence.**—The record itself must show the jurisdiction of the trial court, which is merely statutory, to sign bills of exception and make them a part of the record, and parol evidence is insufficient to show the facts.

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Error to a judgment of the Circuit Court of Nansemond county in an action of *assumpsit*. Judgment for the plaintiff. Defendant assigns error.

*Affirmed.*

The opinion states the case.

*R. W. Withers*, for the plaintiff in error.

*Jeffries & Lawless*, for the defendant in error.

WHITTLE, J., delivered the opinion of the court.

This case affords another example of the omission of the record to show that the bills of exception were signed within the time and in the manner prescribed by the statute in force when the judgment was rendered. Code, 1904, sec. 3385.

The final order recites the verdict of the jury, the motion of the defendant to set it aside, the action of the court overruling the motion, and the entry of judgment for the plaintiff. It moreover notes the exception of counsel to various rulings of the court, and allows the usual suspension. The order then concludes as follows: "Mem.—Be it remembered that during the progress of the trial of this case, the defendant excepted to sundry rulings of the court, to which rulings the defendant is required to tender its bills of exception within the time and in the manner prescribed by law."

Section 3385 provides that "any bill of exception may be tendered to the judge, and signed by him, either during the term at which the opinion of the court is announced, to which exception is taken, or in vacation, within thirty days after the end of such term, or at such other time as the parties, by consent entered of record, may agree upon, and any bill of exception so tendered and signed by the judge, as aforesaid, either in term time or vacation, shall be part of the record of the case." (For the present law on the subject, see Acts 1908, pp. 336-7.)

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The foregoing statute is mandatory, and unless the record affirmatively shows that bills of exception were signed in accordance with its provisions, they do not constitute part of the record. That is the tenor of our own decisions, which conform in that respect to the general rule of procedure on the subject.

“A bill of exception, not dated and not containing a statement that it was signed by the presiding judge within the time allowed by orders extending the time for its signing, will not be considered.” *Keller v. State*, 145 Ala. 680, 40 So. 85.

“Where time is given, extending beyond the term, in which to file a bill of exception, it must be filed within the time limited, or it will constitute no part of the record; and a bill of exception is no part of the record unless the record shows when it was filed.” *Port v. Russell*, 36 Ind. 60, 10 Am. Rep. 5.

“Where time has been given beyond the term for filing a bill of exception, the transcript must affirmatively show that it was filed within the time limited.” *Wiggs v. Koontz*, 43 Ind. 430; *Toledo, W. & W. R. Co. v. Howe*, 68 Ind. 458.

See also 3 Enc. Pl. & Pr. 474, and authorities cited in note.

If it be permissible to consider the affidavit of the clerk (offered in connection with the motion to exclude the bills of exception), it does not help the case for the plaintiff in error, since it furnishes no information either as to the time of signing or filing the bills of exception.

The affidavit likewise shows that the words in the printed record, “The bills of exception referred to in the foregoing order are in the words and figures following, to-wit,” do not appear upon the order book nor among the records of the court, nor were they any part of the final order entered in the case; and were inserted by affiant (at what time does not appear) not as part of the order or record, but merely to call attention to what followed.

Thus it appears that the record is silent as to which, if any, of the statutory requirements have been complied with. The bills of exception bear no date, nor is it otherwise made to ap-

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pear at what time they were signed or filed, or that they ever became part of the record. All that we have on the subject is the statement of the clerk (made as explained in his affidavit) that the bills of exception copied with the record are the bills of exception referred to in the final order of the court. The clerk, of course, had no authority to make them part of the record, nor does the mere copying by him of unauthenticated bills of exception have that effect. *Preston v. The Auditor*, 1 Call. 471; *Cunningham v. Mitchell*, 4 Rand. 189; *Imp. Co. v. Kern & Hickson*, 80 Va. 589, 592-3; *West v. Richmond Ry. & Co., Co.*, 102 Va. 339, 46 S. E. 330; *Blackwood Coal Co. v. James*, 107 Va. 656, 659, 60 S. E. 90.

These constantly recurring questions in the matter of preparation of records for appeal add emphasis to what was said on that subject by Judge Cardwell in a recent opinion: "It is, perhaps, well to call attention to the fact that more miscarriages, in the effort to bring the rulings of trial courts under review in this court, have occurred in the six years since the amended statute, *supra*, has been in force than in all the years prior to its passage. And why? Simply because the statute has not, in the cases where the miscarriages have occurred, been strictly followed, as is absolutely necessary in order to confer authority upon the judges of trial courts to sign a bill of exception and make it a part of the record, after the adjournment of the term at which the final judgment in the cause is entered." *Battershall v. Roberts*, 107 Va. 269, 273, 58 S. E. 588.

In the still more recent case of *Buena Vista Extract Works v. Hickman*, 108 Va. 665, 62 S. E. 804, it was said: "While we are of opinion that a substantial compliance with the statute appears in this instance, correct practice demands that a bill of exception, not signed during the term at which the opinion of the court is announced to which exception is taken, ought to show that it has been signed within thirty days after the end of such term, or at such other time as the parties by consent entered of record may agree upon."

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It follows from these views that the bills of exception in question must be rejected, and the judgment affirmed.

ON A REHEARING.

CARDWELL, J., delivered the opinion of the court.

A judgment was rendered in this cause January 14, 1909, which, upon a petition to rehear, was set aside. The rehearing was granted because of the insistence in the petition therefor that at the former hearing an affidavit of the deputy clerk of the trial court, intended to be incorporated in the record, to the effect that the bills of exception taken at the trial were signed within the time and in the manner prescribed by law when the judgment was entered, was not brought to the attention of this court.

Upon a careful consideration of the case upon the rehearing, we find no occasion to depart from the conclusion reached upon the original hearing. The final order is set out in the former opinion of this court, and the reservation of the right to plaintiff in error to tender its bills of exception to the rulings of the trial court provided that they should be tendered "within the time and in the manner prescribed by law." As there was no consent of the parties, entered of record, that the bill of exception might be tendered and signed by the judge at a time other than during the term of the court or in vacation, within thirty days after the end of such term, they could have been signed and made a part of the record only during the term or within thirty days from the end thereof. As to when the bills of exception were signed by the judge the record is entirely silent, but we are asked to read the affidavit of the deputy clerk as conclusive that "they were filed in the usual manner and that the said judge authorized them to be filed, . . . and that all of said bills of exception were duly signed by the judge and deposited in the office of the clerk before said term of court ended." The affidavit then sets out the

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opinion of the affiant as to what had been the custom of the Circuit Court of Nansemond county with respect to the signing, etc., of bills of exception; that the record before this court in this case was made up as all other records have been made up by him; and that "it is the custom and has always been the practice in this court in making up records for the Court of Appeals for the clerk to note on the record by suitable language the bills of exception."

This same affiant, by another affidavit given in this connection, states when the final order in the case was entered and what it contained; that "there was no order or other memorandum entered by the court or judge, or authorized by the court or judge to be entered, making the bills of exception a part of the record"; and, further, that the following words, which did not appear in the final order, were inserted by him (the clerk) in making up the record for certification to this court, to-wit: "The bills of exceptions referred to in the foregoing order are in the words and figures following, to-wit."

While the insertion of said words by the clerk as a part of the final order may be considered of no importance in this instance, they were clearly no part of the record. *Blackwood Coal & C. Co. v. James*, 107 Va. 659, 60 S. E. 90; *Improvement Co. v. Karn, &c.*, 80 Va. 592.

In *Barstow v. Marsh* (Mass.), 4 Gray 166, the rule is clearly stated as to how and when bills of exception become a part of the record, and the bills of exception in that case were disregarded, although the opinion took occasion to say "it may be a hard case, but there is no way to set it right"; and the ground upon which the exceptions were not considered was "It does not appear by the entries on the docket of the court of common pleas that the exceptions were duly presented at the term at which they were taken; or that a continuance was taken, etc." See also *Doherty v. Lincoln*, 114 Mass. 362; *Brown v. Hale*, 127 Mass. 160.

It is very true that the statute—sec. 3385, Code, 1904—

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says, that as soon as a bill of exception is signed by the judge the bill "shall be a part of the record of the case"; but it must appear from the record itself when the bill of exception was signed and thereby made a part of the record. That fact cannot be made to depend upon parol evidence. Neither parol evidence, nor custom, nor long practice in a particular court, will avail to add to or take from the record as made under the supervision of the trial judge. To depart from this established rule would be to invite interminable strife as to what constituted the record of a case, and confer upon clerks of trial courts power and authority not conferred upon them by the statutes defining their duties, and make in many cases the verity and truth of the record to depend on a conflict of evidence.

Similar language to that in our statute has been construed by the Supreme Court of West Virginia to require the affirmative action of the court, through its order or memorandum on its order book recognizing its bills of exception as authentic. *Wickes v. B. & O. Ry. Co.*, 14 W. Va. 173, 175; *Bank v. Showacre*, 26 W. Va. 48, 53.

The record itself should show the jurisdiction of the trial court, which is purely statutory, to sign bills of exception and make them a part of the record, and parol evidence is insufficient to show these facts.

For the foregoing reasons, as well as those stated, and upon the authorities cited in the opinion delivered at the former hearing of this cause, the judgment entered at that time is approved and will be adhered to.

*Affirmed.*

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Statement.

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**Richmond.**

## SUMMERSON, TRUSTEE, v. DONOVAN.

January 13, 1910.

Absent, Buchanan and Harrison, JJ.

1. **PARTNERSHIP—Advance to Member by Firm—Action at Law Not Maintainable.**—Prior to the settlement of the partnership affairs, an action at law will not lie upon a note given by one member of the firm to the firm for an advance made to him by the firm, though he subsequently sold his interest in the firm to another partner, and the firm was thereafter dissolved, and the note held by the assignee, in liquidation, of the other members of the firm, and the action brought by the assignee in his own name. The debt is not an individual debt due by the partner to the firm, but is a mere item in the partnership account.
2. **RES JUDICATA—Partnership—Firm Assets—Note of Partner.**—The fact that an injunction obtained by a member of a dissolved firm against the prosecution of an action at law by the assignee of the firm, on a note given by him to the firm, was subsequently dissolved and his bill dismissed does not establish the fact that the note was a partnership asset of the old firm, with respect to which there had been no settlement.

Error to a judgment of the Circuit Court of the city of Clifton Forge, in a proceeding by motion to recover a judgment for money. Judgment for the defendant. Plaintiff assigns error.

*Affirmed.*

The opinion states the case.

*Quarles & Pilson and R. C. James*, for the plaintiff in error.

*Jno. T. Delaney and C. M. Lunsford*, for the defendant in error.



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WHITTLE, J., delivered the opinion of the court.

On June 25, 1906, the firm of Bowling, Spotts & Co. advanced to Donovan, one of the partners, \$3,366.80 in excess of his share of the earned profits prior to January 1, 1906, for which sum he made a negotiable note to the firm, payable four months after date. On September 21, 1906, Donovan sold his interest in the partnership to his copartner, Spotts, "without recourse." There had been no settlement between Donovan and his associates since January 1, 1906, and his share in the profits which accrued between that time and the date of the sale had not been ascertained, nor does it appear whether such share is more or less than the amount advanced.

After the sale of Donovan's interest his former partners continued business under the old firm name until May 1, 1907, when they assigned all the assets of the new firm to the plaintiff in error, Summerson, as trustee in liquidation, to wind up the business. Thereupon the trustee brought this motion against Donovan to recover judgment upon the note in question as an asset of the firm.

The trial court held that the note would not support an action at law, and rendered judgment for the defendant, without prejudice, however, to the plaintiff to assert, in such form as he might be advised, any liability resting upon Donovan with respect to the note or any subsequent promise by him to pay the same (the evidence tending to show such promise), or by reason of his having been a member of the firm.

From this statement it appears that the note, which is the subject of this litigation, was not an individual debt due by Donovan to the firm, but that it constituted a mere item in the partnership account, based upon an advance made by the firm to one of its members.

The law is well settled that an action at law cannot be maintained upon such a note.

In 30 Cyc., 461, it is said: "As a rule an action at law by

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one partner against his copartners will not lie on a claim growing out of the partnership transactions until the business is wound up and the accounts finally settled. . . . The principal reasons for requiring an accounting and settlement between copartners, as a condition precedent to an action at law by one against another upon partnership claims and transactions are these: (1) A dispute of this nature ordinarily involves the taking of a partnership account, for until that is taken it cannot be known but that the plaintiff may be liable to refund even more than he claims in the partnership suit. (2) In partnership transactions a partner does not as a rule become the creditor or the debtor of a copartner, but of the firm. Such a settlement may be agreed upon by the partners without an action for an accounting; but in order that it may form the basis of an action at law it must show that the partners have agreed upon the sum which each owes to the other." *Aylett v. Walker*, 92 Va. 540, 24 S. E. 226.

In Story on Partnership (Bennett's Ed.), sec. 384-a, the learned author observes: "If a partner has made advances to the firm, and others have received advances from it, these do not constitute debts, strictly speaking, until the concern is wound up, but are only items in the account between partners."

These principles are elementary and are abundantly sustained by authority. 2 Clement and Bates, Law of Partnership, sec. 849; *Ross v. Carnell*, 45 Cal. 133; *Wilson v. Soper*, 13 B. Mon. (Ky.) 411, 56 Am. Dec. 573.

In *Tindall v. Bright*, Minor (Ala.), 103, it was held that an action at law was not sustainable on a single bill executed by one of the partners to the firm.

In *Richardson v. Bank of England*, 4 Mylne & Craig, 165, 172, Lord Cottenham remarked: "Nothing is more settled than . . . what may have been advanced by one partner or received by another can only constitute items in the account. There may be losses, the particular partner's share of which may be more than sufficient to exhaust what he had advanced, or profits more

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than equal what the other has received; and until the amount of such profit and loss be ascertained by the winding up of the partnership affairs, neither party has any remedy against, or liability to, the other for payment from one to the other of what may have been advanced or received."

He also quotes with approval the language of Lord Eldon, that "Where a sum is advanced as a loan to an individual partner his profits are first answerable for that sum; and if his profits shall not be sufficient to answer it, the deficiency shall be made good out of his capital; and if both his profits and his capital are not sufficient to make good, he is considered as a debtor for the excess."

The plaintiff in error endeavors to escape the consequences of these controlling principles on the theory that the note, though originally merely evidence of an advance made by the firm to Donovan, had been transformed into a private and individual debt by the parties after the dissolution of the partnership. This contention is not sustained by the record. It is true that Donovan sought injunctive relief against the proceeding at law; but the injunction was dissolved and the bill dismissed. The reasons for the decision are not given, and it is insisted that the court would not have dismissed the bill if it had been shown that the note was a partnership asset of the old firm, with respect to which there had been no settlement. If we may indulge in conjecture, it is quite as reasonable to assume that relief was denied on the ground that Donovan had an adequate remedy at law.

But whatever considerations may have influenced the ruling of the court in that case, it was well warranted in holding that the present action could not be maintained. At the same time, as we have seen, the rights of the plaintiff in error upon a proper accounting were fully protected.

The judgment is without error and must be affirmed.

*Affirmed.*

Syllabus.

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**Richmond.**

VINTON-ROANOKE WATER CO. v. CITY OF ROANOKE.

January 13, 1910.

Absent, Buchanan, J.

1. MUNICIPAL CORPORATIONS—*Ordinances—Construction—Free Water—Public Buildings.*—Fish sheds, in existence when a city ordinance was adopted, but not mentioned therein, and which were not connected with the markethouse, and were no part thereof, and were not occupied by the city, but leased to individuals, are not embraced within an ordinance requiring a water company to furnish free water to the public markethouse, courthouse, jail, and other public buildings.
2. MUNICIPAL CORPORATIONS—*Ordinances—Construction—Doubts—Practical Construction.*—Where there is doubt as to the proper construction to be placed upon one clause of an ordinance of a municipality, resort should be had to the whole ordinance, and especially to other clauses of the same section, dealing with the same subject matter, in order to ascertain the meaning of the parties in respect to the subject under consideration. Proper consideration should also be paid to the practical construction put upon the instrument by the parties interested since it has been in operation.
3. MUNICIPAL CORPORATIONS—*City of Roanoke—Ordinances—Construction—Costs of Connecting City Property With Water Mains.*—The ordinances of the city of Roanoke touching free water to be furnished by the plaintiff in error, when read together, clearly show that in every case contemplated by the ordinances the water was to be furnished free of charge by the plaintiff in error, but the city was to pay the necessary costs incident to making connections with the mains of plaintiff in error. When the plaintiff in error had laid its mains along the streets of the city where it could connect and use the water free of charge, its obligation to the city was discharged.

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Error to a judgment of the Corporation Court of the city of Roanoke on a proceeding by *mandamus*. Judgment for the petitioner. Defendant assigns error.

*Reversed.*

The opinion states the case.

*C. A. McHugh*, for the plaintiff in error.

*C. B. Moomaw*, for the defendant in error.

HARRISON, J., delivered the opinion of the court.

The Vinton-Roanoke Water Company is a Virginia corporation engaged in the business of supplying water to the city of Roanoke and its inhabitants, under and by virtue of a franchise granted to it by the city for that purpose. This franchise is in the form of an ordinance of the city council, which grants to the water company certain rights and imposes upon it certain obligations, among others the duty of furnishing to the city water at certain places free of charge.

This proceeding was instituted by the city, asking for a writ of *mandamus* to compel the water company to furnish the necessary water supply for certain fish sheds free of cost, and to a number of fire hydrants at certain points designated by the city. The order appealed from exonerates the water company from all obligation to furnish the fish sheds with water free of charge, but directs a writ to issue compelling the water company to comply with the demands of the city with respect to the fire hydrants.

Cross error is assigned to the ruling of the court, that the water company was under no obligation to furnish the fish sheds with water free of charge.

We are of opinion that this action of the court was plainly right. It is clear from the record that it was not contemplated by either party that the water company was to furnish water

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free of charge to the fish sheds in question. The second section of the ordinance, clause 1, provides that the city "shall have the use free of charge of necessary water for its public markethouse, the courthouse and jail, and for the necessary supply of all other public buildings of said city, including buildings for fire companies and public school buildings used by the municipal authorities of said city." The fish sheds were in existence at the time and were not mentioned in the ordinance. They were in no sense public buildings. They were not connected with, and were no part of, the market house referred to in the ordinance. These sheds were not occupied by the city, but were used by individuals who rented them from the city. The record shows that from the time the water company commenced business in 1897 both parties put this construction upon their contract, and in 1904 the city council provided, in its resolution fixing the rate of rental of these sheds, that the renter should pay for the water used, thus recognizing the right of the water company to charge therefor. This construction of the parties, as already seen, is in accordance with our understanding of their written contract.

The appeal of the Vinton-Roanoke Water Company involves the right of the city of Roanoke to demand that the water company shall furnish the labor, material and apparatus necessary to connect certain fire hydrants, at points designated by the city, with the water company's mains. The water company does not deny its obligation to permit the city to use its water free of charge for all such fire hydrants, but it assigns as error the action of the Corporation Court of Roanoke in holding that under the terms of its franchise it is required to furnish the necessary apparatus and to connect such fire hydrants with its water mains without being reimbursed by the city for such outlay.

The corporation court rests this conclusion exclusively upon the terms of clause 8 of section 2 of the ordinance, which provides as follows: "The said company shall furnish water free

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of charge to fire hydrants in the city at such points as said city may designate, along such streets as said company has caused to be laid its water mains, should said city demand same; provided, however, that said city shall furnish said fire hydrants at its own expense."

It is not clear that the language of this clause justifies the construction placed upon it by the corporation court. The company is only required by it to furnish water free of charge for the hydrants designated by the city at points along its water mains. Nothing is said about connecting the hydrants with the mains, or who was to pay the cost of such connection. Resort must, therefore, be had to the whole ordinance, and especially to other clauses of the same section, dealing with the same subject matter, in order to ascertain the intention of the parties with respect to the subject under consideration. *Chalmers v. Funk*, 76 Va., 717; *Postal Tel. Co. v. Farmville Ry.*, 96 Va., 661-45, 32 S. E. 468.

Section 2 of the ordinance contains three clauses relating to the furnishing of water to the city. Clause 1 provides that the company shall furnish water free of charge to certain public buildings named therein; provided *that the said company shall be put to no expense in constructing and maintaining the pipes, tapping said company's mains, and the plugs necessary for this purpose.*

Clause 4 provides that the company shall furnish free of charge water for the purpose of supplying three troughs for horses and three public drinking fountains, to be placed at such points as may be designated by the council, provided they be so situated as not to necessitate the laying of additional mains, and provided, further, that the city shall furnish at its own expense the watering troughs and drinking fountains, and place the same in position.

Clause 8, which has been already quoted, provides for furnishing water free of charge to fire hydrants.

These provisions, together with other parts of the ordinance

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touching the same subject matter, clearly show that it was intended that in every case contemplated by the ordinance the water company should allow the city to use its water free of charge, and that the city should pay the necessary cost incident to connecting itself with the company's water mains. When the company had laid its mains along the streets where the city could connect and use the water free of charge, its obligation to the city was discharged. The record shows that since the contract evidenced by the ordinance was adopted, twelve years ago, the parties have themselves placed this construction upon it, and have acted upon this view of their rights under it. This is material and throws much light on the question at issue, if it is not decisive of it.

We are of opinion that the corporation court erred in issuing a writ of *mandamus* to compel the Vinton-Roanoke Water Company to furnish the necessary apparatus and connect its water mains with the fire hydrants of Roanoke city.

The order complained of must, therefore, be reversed and set aside, and this court will enter such order as the corporation court should have entered, denying the writ of *mandamus*, and dismissing the petition therefor, with costs.

*Reversed.*



Statement.

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**Richmond.**

VIRGINIA-CAROLINA CHEMICAL CO. v. SOUTHERN EXPRESS CO.

January 13, 1910.

Absent, Buchanan, J.

1. CARRIERS—*Claim For Lost Goods—Time For Filing—Reasonable Regulations.*—A provision in a receipt given by an express company for the carriage of goods, that the company shall not be liable for any loss or damage unless the claim therefor shall be presented in writing to it at the office of issue within thirty days from its date, is a reasonable and binding provision which must be complied with according to its tenor, otherwise the company cannot be held liable.
2. CARRIERS—*Lost Goods—Time For Filing Claim—Waiver—Estoppel.* Efforts to assist the owner to find a lost shipment after the carrier's exemption from liability therefor has attached under the terms of its bill of lading, do not constitute a waiver by the carrier of his right to claim such exemption, if the goods be not located. Conduct will not operate an estoppel against one who has not been induced thereby to alter his position to his prejudice.

Error to a judgment of the Circuit Court of the city of Richmond in an action of *assumpsit*. Judgment for the defendant. Plaintiff assigns error.

*Affirmed.*

The opinion states the case.

*Cocke & Pickrell*, for the plaintiff in error.

*Thos. W. Shelton* and *A. S. Buford, Jr.*, for the defendant in error.

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WHITTLE, J., delivered the opinion of the court.

The Virginia-Carolina Chemical Company brings error to an adverse judgment in an action of *assumpsit* against the Southern Express Company to recover damages for the loss of certain farmers' notes given for fertilizers, which were delivered by the plaintiff's agent to the defendant at Cunningham, North Carolina, to be transported thence to the city of Richmond for delivery to the plaintiff.

The receipt given by the defendant for the notes contained the stipulation that "In no event shall the Southern Express Company be liable for any loss or damage unless the claim therefor shall be presented to them in writing at this office within thirty days after this date, in a statement to which this receipt shall be annexed."

The shipment was made on July 8, 1903, and the plaintiff was advised of the loss during that month; yet it is conceded that no notice in writing of a claim therefor was given until long after the expiration of the thirty days.

Such requirements are not construed as contracts against negligence, but are upheld by the courts generally as reasonable and binding provisions which must be complied with according to their tenor, otherwise the defendant cannot be held liable. *Atlantic Coast Line v. Bryan*, 109 Va. 523, 65 S. E. 30.

In the case of *Liquid Carbonic Company v. N. & W. Ry. Co.*, 107 Va. 323, 58 S. E. 569, 13 L. R. A. (N. S.) 753, it was held that "a common carrier is always responsible for his negligence, no matter what his stipulations may be; but an agreement that claim shall be made in a reasonable specified period contravenes no public policy, excuses no negligence, and is perfectly consistent with holding the carrier to the fullest measure of good faith, diligence and capacity which the strictest rules of the common law ever required; and such an agreement is valid."

The plaintiff in error recognizes the existence and force of

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the general rule, but seeks to escape the effect of it by invoking the doctrine of *waiver*.

It is true that after the time limit had expired and the liability of the defendant had ceased, the agents of the company were diligent in their efforts to lessen the plaintiff's damage, as far as practicable, by collections on the lost notes; and from that source the loss was reduced from \$1,980.23, the face amount of the notes, to \$776.05. Nevertheless, there is nothing in the record to warrant the assumption that the express company has by words or act admitted liability or waived its right to insist upon the exemption afforded by the thirty days' clause.

In the *Atlantic Coast Line Railroad case*, *supra*, it is said: "A waiver to operate as such must arise in one of two ways, either by contract or by estoppel. If by contract, it must be supported by a valuable consideration—that is, such consideration as will support any other contract." Again, at page 251, the court observes: "In order for there to be an estoppel by conduct, the party sought to be estopped must have caused the other party to occupy a more disadvantageous position than that which he would have occupied except for that conduct. . . . 'Conduct will not operate an estoppel against one who has not been induced thereby to alter his position to his prejudice.' *Terry v. McClung*, 104 Va. 59, 52 S. E. 355; *Rorer Iron Co. v. Trout*, 83 Va. 410, 2 S. E. 713, 5 Am. St. Rep. 285. . . . It cannot be held that this action of the company in attempting to find the lost shipment, after its exemption from liability had attached under the stipulation of its bill of lading, was a waiver of its right to claim such exemption, if the goods should not be located."

If in the instant case we leave out of consideration, as we must do, the letters and evidence of loose statements of subordinate agents of the company, who are affirmatively shown to have been clothed with no authority to speak for or to bind their principal, then there is nothing in the record upon which to found the theory of waiver.

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The circuit court, therefore, did not err in refusing to instruct upon that hypothesis, and in telling the jury "that if they believe from the evidence that the plaintiff gave the defendant written notice of its claim, on account of failure to deliver the package within thirty days from the date of delivery of the package to the company, as required by the contract made with said company, . . . the plaintiff has not shown a right to recover in this case, and they will find for the defendant." *Taylor v. B. & O. Ry. Co.*, 108 Va. 817, 62 S. E. 798.

There are several other questions in the case of minor importance which present no ground for reversal, and need not be discussed.

*Affirm*

**Syllabus.**

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**Richmond.**

**WRIGHT v. ATLANTIC COAST LINE RAILROAD COMPANY.**

January 13, 1910.

Absent, Buchanan, J.

1. **RAILROADS—*Personal Injury—Contributory Negligence.***—One who deliberately stands upon a railroad track in front of a rapidly approaching train, in plain view, and is struck by the train, is guilty of such contributory negligence as bars recovery.
2. **NEGLIGENCE—*Risk to Save Life—Imminent Peril—Negligence of Defendant.***—The right of one person voluntarily to risk his life or safety to rescue another from imminent danger caused by the negligence of another involves two propositions—first, the party to be rescued must be in imminent danger; and, second, that peril must have been caused by the negligence of that other. Furthermore, to hold that other liable, the person to be rescued must have been, at the time of the attempted rescue, in a place of imminent danger caused by the negligence of the defendant, in order to excuse the contributory negligence of the rescuer.
3. **RAILROADS—*Sounding Whistles—Knowledge of Danger.***—A plaintiff cannot complain of the failure of the servants of a railroad company to sound the whistle of an engine if he has all the knowledge he would have had if the whistle had been sounded. The purpose of sounding the whistle is to give warning of an approaching train to those who are ignorant of its approach.
4. **RAILROADS—*Persons Approaching Track—Presumption.***—A railroad company cannot be held liable for the failure of its engineer to anticipate that a person approaching a crossing is going to step upon the track immediately in front of a rapidly moving train, unless there is something to suggest to the engineer that such person does not intend to remain in a place of safety. He has the right to assume that the person is in possession of his faculties, and will retain his place of safety.
5. **RAILROADS—*Signal to Stop—Remaining on Track—Personal Injury.***  
A signal to stop, given by a stranger, to a train which is under no obligation to stop, is no warning to the engineer that a person in a place of safety is going to step on the track immediately

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in front of the train, and the apprehension that he may do so cannot justify the person giving the signal in remaining on the track until struck by the oncoming train.

6. NEGLIGENCE—*Risk to Save Life—Self-Imposed Peril.*—The attempted rescue of one from a self-imposed peril by stepping onto a railroad track immediately in front of a rapidly approaching train, cannot excuse the negligence of the rescuer in remaining on the track till struck by the train.
7. CARRIERS—*Passenger—Care For His Own Safety.*—A passenger is bound to exercise ordinary care for his own safety.
8. NEGLIGENCE—*How Pleaded—Wilful Injury.*—Negligence is a conclusion of law from facts sufficiently pleaded. It is not sufficient to charge that the plaintiff was wilfully and wantonly injured. The facts relied on to establish the wilful and wanton negligence for which the defendant is to be held liable must be stated with reasonable certainty.

Error to a judgment of the Circuit Court of Nansemond county in an action of trespass on the case. Judgment for the defendant. Plaintiff assigns error.

*Affirmed.*

The opinion states the case.

*Robert W. Withers*, for the plaintiff in error.

*D. Tucker Brooke, Wm. B. McIlwaine and E. E. Holland*, for the defendant in error.

HARRISON, J., delivered the opinion of the court.

This action was brought by Maude L. Wright to recover damages for injuries alleged to have been suffered in consequence of the negligence of the defendant railroad company. There was a demurrer to the plaintiff's declaration and to each of its four counts, which was sustained by the circuit court, and thereupon this writ of error was awarded.

In the view we take of the case it is only necessary to consider the ground of demurrer which rests upon the contention

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that the plaintiff was guilty of such contributory negligence as to preclude all right of recovery under her declaration.

Taking the declaration as a whole, its salient allegations are, that on the day of the accident the plaintiff, a young, strong, active woman, and her mother, went to "Dean's," a flag station on the line of defendant's road, to take passage for Suffolk, another station on the line of the same road; that at Dean's no regular resident agent was employed, those desiring to board trains being invited and required to stand on or near the track and waive some object across the track as a signal to the engineer to stop the train; that the station was reached within one hour before the arrival of the expected train, and while her mother was some distance away and on the opposite side of the track from the station, the plaintiff saw a train coming which she took to be the passenger train she expected to take, but which turned out afterwards to be a fast freight train; that she saw this train when it was five hundred yards off, and when it could have been easily stopped before reaching the station, and that as soon as she saw it she stepped upon the track and commenced, in the usual and customary way, signaling to the defendant's employees to stop the train by waiving across the track a large bag or box, which was seen by those in charge of the train in ample time to stop before reaching the station; that while thus standing and signaling the train she saw her mother walking along the public highway toward the railroad crossing, twenty yards east of the station, in the unobstructed view of the employees on the approaching train, and at such an angle that her mother's back was toward the engine, and that unless her mother stopped or turned aside, or unless the approaching engine was stopped or its speed slackened, her mother would reach the track at the public crossing just in time to be struck and killed, all of which was plainly seen by the defendant's servants, who carelessly and negligently failed to sound the whistle for the public crossing as required by law, and that thereupon, in order to save her mother from the danger in which the defendant's negligence had placed her, and

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from the certain death then impending, she shouted to her mother to stop, which, because of the noise and confusion her mother did not hear, or if she heard did not heed; that at the same time the plaintiff persistently stood on the track in full and unobstructed view of the employees who were operating the train and while there was ample time to stop or slacken the speed of the engine, plaintiff believing that the only way to save her mother was to keep herself in an obviously dangerous place and thus stop the oncoming train; that under these circumstances the defendant's employees knew or ought to have known that she expected them to stop the train or to impede its speed, and that she would not get off the track until one or the other had been done; that the defendant, not regarding its duty, but grossly violating the same, wrongfully and negligently failed and refused to stop its train or slacken its speed, or to indicate by short blasts of the whistle, as is the well known custom, that the train would not stop, by reason of which negligence the engine struck and killed the mother, and that the plaintiff was either struck by the lifeless body of her mother being hurled with great violence against her, or the plaintiff not having gotten quite out of harm's way was struck by the overhanging parts of the engine, thereby causing the injuries complained of.

The first, second and third counts of the declaration allege that the plaintiff bore to the defendant company the relation of a passenger. The fourth count alleges that she was a licensee, and further alleges that the employees of the defendant wilfully and wantonly injured the plaintiff by failing and refusing to stop the train or to slacken its speed.

These allegations show that the plaintiff deliberately stood upon the track in front of a train which she saw was rapidly approaching her, and made no effort to get out of its way. She deliberately refused to exercise even ordinary care to avoid injury, which she could have easily done by stepping to one side. There can be no question that she was guilty of contributory negligence, unless, as contended, her act is to be excused upon the



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**Opinion.**

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ground that she was injured while attempting to save a human life, which was, as alleged, placed in jeopardy by the defendant.

It is not denied that the law is well settled that it is not contributory negligence, *per se*, for one voluntarily to risk his own safety or life in attempting to rescue another from imminent danger caused by the negligence of the defendant. This principle involves two propositions: First, it must appear that the party to be rescued is in imminent danger; and, second, that the peril must have been caused by the negligence of the defendant.

The alleged peril of the mother at the time the attempt at rescue was made by the plaintiff may well be questioned. The allegations show that while the plaintiff was standing upon the track and signaling the approaching train, she observed her mother approaching the railroad crossing along the public road, and shouted to her to stop, but that because of the noise her mother did not hear, or hearing did not heed. The attempted rescue consisted in signaling the train and shouting to her mother while she was walking along the road, not in peril, but in a place of safety. It would seem that the mother's peril arose when she deliberately stepped from her place of safety in the public road upon the track in front of a rapidly moving train, when it was too late to save her or to save the plaintiff.

According to the authorities, as already seen, the mother must have been, at the time of the attempted rescue, in a place of imminent danger caused by the negligence of the defendant, in order to excuse the contributory negligence of the plaintiff. The negligence which is alleged to have put the mother in peril is that the defendant's servants failed to blow the road crossing signal, and failed to blow a warning signal, or to stop or slacken the speed of the train after the engineer saw her danger.

Assuming that the failure to sound the whistle was negligence, the question is, did the failure to sound it put the plaintiff's mother in peril?

The purpose of sounding the whistle is to give warning of an approaching train to those who are ignorant of its approach.

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The allegations of the declaration quite plainly show that the plaintiff's mother knew the train was approaching. The plaintiff alleges that her mother did not hear her shout because of the noise. The noise referred to must have been the noise of the train—no other noise is suggested by the facts alleged. The plaintiff was standing in front of her mother signaling the train to stop, and the mother was walking toward her. The mother was near enough to the approaching train to step from the public road immediately in front of the engine, just in time, as alleged, to be struck and killed. The plaintiff in her petition for this writ of error practically admits that her mother knew the train was coming when she says: "Just at this time the plaintiff saw her mother, who had evidently seen her flagging, coming to get on the train." It cannot be doubted from these allegations that the mother both saw and heard the train, and, therefore, had all the knowledge she would have had if the whistle had been sounded; and yet with this warning she stepped upon the track just in time to be killed. *Southern Ry. Co. v. Daves*, 108 Va. 378, 61 S. E. 748.

Further, no duty rested upon the servants of the defendant who were operating the train to either stop or slacken its speed. During all the time the plaintiff's mother was approaching along the public road to the crossing she was in a position of safety, and there is no rule of law which charged the engineer with knowledge that she was about to change her position of safety for one of peril. The railroad company cannot be held liable for the failure of the engineer to anticipate that a person approaching a crossing is going to step upon the track immediately in front of a moving engine, unless there is something to suggest to the engineer that the person does not intend to remain in a place of safety. The rule is believed to be universal—it is certainly firmly established in this jurisdiction—that the engineer has the right, under such circumstances, to assume that the party is in the possession of his faculties and will retain his place of safety, and not recklessly expose himself to danger. *Johnson's*

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*Admr. v. C. & O. Ry. Co.*, 91 Va. 171, 21 S. E. 238; *Southern Ry. Co. v. Daves, supra*; *N. & W. Ry. Co. v. Davis' Admr.*, 108 Va. 514, 62 S. E. 337.

It is contended that the signal the plaintiff was making with her bag or box should have been a warning to the engineer. That was not a danger signal, but a signal to stop a passenger train at a flag station where the freight train was under no obligation to stop. The engineer knew from that signal that the plaintiff was aware of the approach of his train, and had the right to assume that she would not remain on the track until it was too late for him to avoid a collision. The signaling of the plaintiff did not suggest that the mother was going to leave her place of safety and step on the track immediately in front of the moving engine.

The mother's peril, from which the plaintiff attempted to rescue her, was, therefore, not the result of the alleged negligence of the defendant in failing to sound whistles, or in failing to stop or slacken the speed of its train, but was due solely to her own negligence, and, therefore, the attempted rescue cannot excuse the negligence of the plaintiff in remaining upon the track in front of an approaching engine until injured in the manner complained of.

It is not necessary to decide in this case the question whether or not the plaintiff was a passenger, for if she bore that relation and was entitled to the high degree of care it imposes upon the defendant, she would not be thereby relieved from the duty of exercising ordinary care for her own safety. *Pendleton v. R., F. & P. R. Co.*, 104 Va. 813, 52 S. E. 574.

The fourth count alleges that the negligence of the defendant was wilful and wanton, but it contains no allegation which shows intentional wrong on the part of the engineer. It alleges no omission of duty which would make his conduct wilful or wanton. It is not sufficient to charge that the plaintiff was wilfully and wantonly injured. If that naked allegation were sufficient, the plaintiff could, in every case, be easily re-

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lieved from the consequences of his own imprudence. Negligence is a conclusion of law from facts sufficiently pleaded. The facts relied on to establish the wilful and wanton negligence for which the defendant is to be held liable must be stated with reasonable certainty. No such facts are alleged in the count under consideration.

There is no error in the judgment of the circuit court sustaining the demurrer to the plaintiff's declaration, and it is affirmed.

*Affirmed.*

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**Syllabus.**

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**Richmond.**

YOUNG AND OTHERS v. CAMP MANUFACTURING CO.  
AND  
WRIGHT AND OTHERS v. CAMP MANUFACTURING CO.

January 13, 1910.

Absent, Buchanan, J.

1. LOGS AND LOGGING—*Standing Trees—Conveyance—Time of Removal—Reasonable Time—Case in Judgment.*—The owner of land conveyed to a manufacturing company all the pine timber standing upon the land that would measure twelve inches in diameter across the stump at the time of cutting, with the right, for a period of five years from the date of the deed, to cut and remove the same, and, if not cut and removed within said time, the further right to extend the time for cutting and removing for such further time as the grantee might desire, upon payment of interest at six *per cent. per annum* upon the price agreed to be paid for trees.

*Held:* 1. It was not the intention of the parties to give an absolute and unconditional title to the timber, but only such as was cut and removed within the time limited by the deed, and such extensions thereof as the grantee was entitled to demand upon a fair construction of the deed, or as might be agreed upon by the parties.

2. The grantee has not a wholly indefinite period in which to cut and remove the timber which it has purchased, but must cut and remove it within a reasonable time after the expiration of the fixed period.

3. The question of what is reasonable time is one of fact dependent on the circumstances of each case. The rights of the grantor are not to be measured by the convenience or inconvenience, the ability or inability of the grantee, caused by and resulting from the magnitude and extent of its business, and its numerous other contracts to which the grantor is a stranger. In the case at bar, one year from the certification of the decree of this court to the circuit court is a reasonable time.

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Appeals from decrees of the Circuit Court of Brunswick county. Decree for the complainant. Defendants appeal.

*Reversed in part.*

The opinion states the case.

*Braxton, Williams & Eggleston and R. T. Thorp*, for the appellants.

*J. C. Parker, E. R. Turnbull, Jr., E. P. Buford, R. B. Davis, and Hill Carter*, for the appellee.

KERTH, P., delivered the opinion of the court.

These two cases were heard together, and the decision of them depends upon the construction of language in deeds common to them both, and in all material respects identical in terms.

The Camp Manufacturing Company, a corporation under the laws of Virginia, filed its bill in which it shows that Young and others, by their joint deed, in consideration of the sum of \$250, which was paid, conveyed to it all the pine timber twelve inches in diameter across the stump at the time of cutting, on a tract of land in the county of Brunswick; that by said conveyance complainant was granted the right, for a period of five years from the 24th day of January, 1895, the date of said deed, in which to cut and remove the said timber, and the further right that if it should fail to remove the said timber within five years it should have such further time in which to remove it as it might desire; provided, however, that it pay interest to the grantors or their assigns, at the rate of *six per cent. per annum* on the purchase price named in the deed, which was \$250, from the expiration of the said five years until the timber was removed. The bill further shows that the Camp Manufacturing Company, at the end of the first period of five years, to-wit, on the 24th day of January, 1900, finding that it would need further time in which to cut and

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remove the timber, and to exercise the rights and privileges granted in the deed, paid to the grantors the sum of \$15.00, being the interest on the purchase money for one year, in settlement of the amount due the grantors for the continuation of the privileges granted in said deed from the 24th of January, 1900, to the 24th day of January, 1901, and subsequently thereto each year has tendered to the grantors a like sum of \$15.00 per year, which sums have been accepted by the grantors for a period of four years, down to the 24th of January, 1904; but that they have declined to accept said payment covering any period since the 24th of January, 1904, though the complainant has regularly each year tendered to the grantors the amount due them under the terms of the deed. The complainant alleges that it is now the owner of the timber, rights and privileges which were conveyed by Young and others to it, and that neither it nor its assigns had done anything to forfeit its rights to the said timber, rights and privileges; that its title to the same is complete; and that it has done all and everything that was necessary, or provided in the said deed, for the preservation of its title to the said timber.

The bill then goes on to recite that certain persons are cutting the timber which had been conveyed to it; that the men thus engaged were in the employment of one J. E. Mays, who claims the timber by virtue of a deed from its grantors, Young and others, and in reply to the remonstrance of complainant it was informed that they proposed to continue cutting and removing the timber; that the cutting and removing of the timber is an irreparable injury to the complainant, for reasons stated at large in the bill; that the remedy at law would not only involve a multiplicity of suits and great delay, but would be unavailing because those committing the trespass are insolvent; and an injunction, therefore, is asked for to prevent the cutting of the timber upon the tract of land described, and that an account be taken of the timber already cut and

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removed from the land in violation of the rights of complainant.

The defendants answered this bill, denying all its material averments; and proof being taken, the court was of opinion, as appears from the fourth paragraph of its decree, that the deed from Young and others to the Camp Manufacturing Company passed to and vested in the Camp Manufacturing Company "the present absolute title to all the pine timber that was on the tract of land described therein at the date of said deed which was then twelve inches in diameter or larger, or which would grow to said size within the time limited by this decree for removing the same, which title is defeasible as to such of said timber as shall not be removed from the said land within the time prescribed by the terms of said deed as construed by the fifth paragraph of this decree, and as to such of said timber as does not grow to the size of twelve inches in diameter across the tree stump, and larger, at the time said trees are reached in the process of cutting."

And in the fifth paragraph it is held that "the title to said timber has never reverted to the grantors, and that the Camp Manufacturing Company is now entitled to a reasonable time within which to cut and remove the same from said land, which reasonable time the court, upon the evidence in this cause, adjudges to be ten years from this date, provided the Camp Manufacturing Company shall pay to the grantors interest on the purchase money for each year that the Camp Manufacturing Company allows said timber to remain on said land, after the expiration of the first period of years granted in said deed."

To that decree an appeal was allowed.

The first proposition contended for by appellants is that "Whenever, in an instrument conveying standing timber, there is a clause, either prescribing or granting a certain time in which the vendee should or might cut or remove timber, the grantee has no title whatever to any timber not cut or removed at the expiration of said period."



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In support of this proposition the case of *Adkins v. Huff*, from the Supreme Court of West Virginia, is cited, 58 W. Va. 645, 52 S. E. 773, 3 L. R. A. (N. S.) 649. In that case the court says: "The authorities are practically uniform in holding that an instrument granting standing timber, and containing a clause requiring or permitting it to be removed within a specified time from the date of the grant, gives no absolute and unconditional title to the property. Some courts hold the right of the grantee to be a license, others a lease, and others a defeasible title to the timber. By the great weight of authority it is determined that no right or title exists in the grantee after the expiration of the time specified in the deed or contract."

In *Clark v. Guest*, 54 Ohio St. 298, 43 N. E. 862, the court said in the case of sale of standing timber, or of an exception of the timber on a conveyance of the land, the timber must be cut and removed within the time limited in the written instrument and all that is not so cut and removed adheres in the land, freed from the sale or exception; as the legal effect of such contract of sale or exception of timber is a right to only so much timber as shall be cut and taken off within the limited time.

In *McRae v. Stillwell*, 111 Ga. 65, 36 S. E. 604, reported and annotated in 55 L. R. A. at p. 513, an instrument in the form of a deed, purported to convey to the grantee at a specified price per acre "all the pine timber suitable for sawmill purposes" on described lots of land. It acknowledged receipt of a specified sum, and recited that the grantor agreed "that the amounts left unpaid this day shall be paid as follows: When each lot is entered to cut said timber, the balance due on each lot is \$100, which will be due as above stated." The instrument also purported to convey to the grantees, their heirs and assigns, "the full right of way for railroads, tram-roads and wagon roads in and through the said lands for the purposes above stated, said right of way to continue as long as said mill operations may require." It was held, that the true intent and meaning of this instrument was to convey to the grantees, their

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heirs and assigns, all the timber suitable at the date of the instrument for the purposes indicated, but that it was incumbent on the grantees or their successors in title to cut and remove such timber from the lots within a reasonable time from the date of the conveyance, and that on failure so to do their interest in the timber ceased and determined; and that what would be a reasonable time for so doing was a question of fact to be passed upon and decided in the light of all the facts and circumstances surrounding the transaction.

In the exhaustive note to this case it is said, *inter alia*, that, "According to the weight of authority the title to standing timber passes immediately on the execution of the instrument of conveyance, although there are a few cases to the effect that the title does not pass until the timber is cut. Thus a provision in a deed of standing timber, that the purchaser, his heirs and assigns, shall have license for ten years to enter on the land to cut and remove the timber, and that all such timber not so cut and removed during such term shall belong to the vendor, does not prevent the title to the timber from vesting in the purchaser. And where by a lease of land the lessee, in consideration of the use and possession of the premises, agrees to pay the taxes and cut off all the timber and brush on a specified part of the premises, the lessor agreeing to let him have all the timber for cutting it off, which is to be done in a specified time, the right of the lessee to the timber is vested, and is not extinguished by a sale of the land during the term of the lease to one with notice of it; and where the purchaser prevents his removal of the timber within the time specified by causing his employees to leave by threats of prosecution, and by dissuading others from entering his service, he is liable for the damages resulting therefrom." Citing *Crane v. Patton*, 57 Ark. 340, 21 S. W. 466.

See also *Webber v. Proctor*, 89 Me. 404, 36 Atl. 631; 28 Am. & Eng. Ency. L. (2d ed.) 541; 25 Cyc. 1551.

There seems to be a little diversity among the cases, most

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of them holding to the effect that the purchaser has no title to any timber which is not cut at the expiration of the time specified therefor, although a very few hold that the title to the timber in such case is still in the purchaser, but that the right to enter for the purpose of cutting and removing it is lost thereby. Thus it is said, in *Howard v. Lincoln*, 13 Me. 122, that where one sells trees of a specified size, the purchaser to have three years to haul the same, the title to all the trees uncut at the end of that time is in the vendor. And in *Prentiss v. Ross*, 96 Mich. 83, 55 N. W. 613, it is said that where a contract for the sale of standing timber provides that it is to be taken from the land within one year and no longer, the purchaser loses all interest in such timber as is standing at the expiration of the year.

The cases cited in the opinion filed by the learned judge of the circuit court are, indeed, quite sufficient to maintain this proposition.

Among them is *Salstonstall v. Little*, 90 Pa. St. 422, 35 Am. Rep. 683, where it was held that a deed for land reserving to "the parties of the first part hereto, their heirs and assigns, all the pine timber on the aforesaid six warrants or tracts, together with the right and privilege to cut, remove, take and carry away the same, or any part thereof, at any and all times, also the right of ingress and egress at any and all times, for the space or term of twelve years from the date first above written for the purpose so as aforesaid, was a reservation of the timber for twelve years, and no longer, and after that time the trees remaining passed with the grant of the soil to which they were attached."

In *McIntyre v. Barnyard*, 1 Sandf. Ch. (N. Y.) 52, a deed granted, bargained and sold all the pine timber standing or being on certain land, together with the right of entering upon the land until January 1, 1841, to cut and remove the said timber. It was held that this latter clause was designed to limit the whole grant; and that the object of the grant was the sale

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of all the pine logs which should be taken off by January 1, 1841, and nothing beyond that date. "It is only by this construction," said the court, "that we can give full scope to the whole intention expressed by the instrument; and at the same time we relieve it from the irrational consequences to which the defendant's construction inevitably leads."

Looking to the whole deed, and all of its provisions must be considered in order to arrive at its proper construction, we are of opinion that it was not the intention of the parties to give an absolute and unconditional title to the timber, but only such as was cut and removed within the time limited by the deed, and such extensions thereof as the grantee was entitled to demand upon a fair construction of the deed, or as might be agreed upon between the parties.

The deed in question was made on the 24th day of January, 1895. The first period expired on the 24th of January, 1900. That period was extended from year to year down to the 24th of January, 1904, or a period of nine years from the date of the deed, and then the disagreement between the parties as to their rights in the timber under the deed arose; the contention upon the part of the Camp Manufacturing Company being that the deed under which it held gave it an absolute right in the trees, to be cut and removed "as they may desire"; that for an indefinite period, so long as it paid to its grantors the sum of \$15.00 a year, which was six *per cent.* interest upon the purchase price, it was entitled to enter upon the land, with all the incidental rights and privileges mentioned in its deed, for the purpose of cutting and removing the pine timber which at the time of cutting had reached the dimensions prescribed in the deed, viz., twelve inches in diameter across the tree stump.

The incidental rights which passed to the Camp Manufacturing Company in the land of the grantors, as the right to erect buildings, to use and operate railroads, tramways or bogy roads over and across the land of the grantors, to use

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material from the said land along said roads, tramways, etc., as may be necessary and convenient to build and maintain the same, and the right to remove them within five years after ceasing to operate, use and occupy them, impose such burdens upon the land of the grantors as greatly to diminish, if not, indeed, to destroy, its value.

Taking the whole contract together, we cannot think that the grantors ever intended to confer any such right upon the grantee; and that it would be unreasonable to hold that it was intended to confer upon the Camp Manufacturing Company a right to cut and remove within a wholly indefinite period the timber which it had purchased. It is true that the contract says that "if it shall fail to remove said timber in said time (the specified period of five years) it may have such further time to remove the same as it may desire." But that language, if literally construed, might be extended to one, or a hundred, or a thousand years—that is to say, it is wholly indefinite and fixes no time within which the contract is to be executed, and it is, therefore, to be executed within a reasonable time. *Duke v. N. & W. Ry. Co.*, 106 Va. 152, 55 S. E. 548.

In 25 Cyc. 1553, it is said: "Except where the deed clearly manifests an intention on the part of the grantor to convey to the grantee a perpetual right to enter upon the land and cut trees, the purchaser will be allowed only a reasonable time to remove the timber, where the conveyance contains no provision as to the time for exercising the right of removal. . . . The question of what is a reasonable time is one of fact dependent on the circumstances of each case; there are no fixed rules for its ascertainment."

To the same effect is 28 Am. & Eng. Ency. L. (2d ed.) 542; *Heflin v. Bingham*, 56 Ala. 566, 28 Am. Rep. 776; *Boults v. Mitchell*, 15 Pa. 371, which say that, where one purchases all the timber on certain land suitable for rafting and sawing, he may be compelled to take off the timber in a reasonable time to be determined by the jury, as otherwise the grantee might claim

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to enter upon the land for an indefinite period of time, and by refusing to remove the timber entirely defeat the culture and improvement of the soil. *Andrews v. Wade*, (Pa.) 6 Atl. 48.

In *McRae v. Stillwell*, *supra*, the court says among other things, that "while it is possible . . . for parties to make a contract whereby one would be entitled to a perpetual right to enter upon the land of another and remove timber therefrom, as such an agreement is so unreasonable in its nature, no contract will be presumed to have this effect unless it is plainly manifest from the terms of the same that such was the intention of the parties."

In *Hill v. Hill*, 113 Mass. 103, 18 Am. Rep. 455, the court says: "It is not reasonable to presume that it was the intention of the parties to subject the land to a permanent easement. The right claimed by the plaintiff would deprive the defendant of the full use and enjoyment of his land for an indefinite time, which might extend through his life, and would give the plaintiff for that time the principal, if not the sole, beneficial use of it. . . . The claim of the plaintiff that he had the right to have the trees remain, drawing nourishment from the soil, as long as he chose, is, we think, contrary to the intention of the parties."

Thus far we have in the main followed along the line pursued by the learned judge of the circuit court, and we fully concur in the conclusion stated in the fourth and fifth paragraphs of the decree above set forth. There are decisions to the contrary, but we think the great weight of authority sustains our conclusion.

Without undertaking to review the cases relied upon by appellee, we shall refer to *Keystone Lumber & Mining Co. v. Brooks*, from the Supreme Court of Appeals of West Virginia, reported in 65 W. Va. at p. 512, 64 S. E. at p. 614. It is a recent case from the same court which decided *Adkins v. Huff*, *supra*, and is strongly relied upon by counsel for appellee.

The Keystone Lumber Company conveyed to George W. Bar-

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ricklow certain timber as follows: "Does grant unto the party of the second part all kinds of timber standing or being on all that certain tract of land lying and being in the county of Webster in the State of West Virginia on the waters of Laurel creek and Birch river, and bounded and described as follows: . . . Together with the right to second party to enter upon and use the land so far as is necessary or required in manufacturing and removing said timber, free of any rental or charge whatsoever for a period of six years . . . with the right to construct roads and tramways and place mills thereon and to remove the same at any time during, at or after the periods of time above mentioned." In the course of its opinion the court says: "In case of a conveyance of timber, with a time limit requiring its removal from the land in a given time, the weight of authority is that the conveyance is conditional, the purchaser taking only what timber shall be removed within that time, and the balance reverting to the owner of the land, or rather remaining his. . . . We cannot concur in such a construction of the deed. Look at it. There is at the outset the separate, distinct, vital clause found in deeds of grant, prescribed in our Code as a form 'to convey the grantor's whole interest' in the thing granted, having the operative words 'does grant.' That vests full legal title in the grantee to the timber. Where do we find in this granting clause any words to tell us that only so much of the timber as may be removed within six years is granted? To the reverse, the grant is of 'all kinds of timber,' without limitation of time for removal. This important section of the deed contains no limit of time, no forfeiture clause for non-removal. If timber is conveyed, and no limit of time as to removal, the title vests absolutely in the grantee, and it is not lost or forfeited by reason of the fact that it is not removed in a reasonable time." Quoting from *Holt v. Stratton Mills*, 54 N. H. 109, 20 Am. Rep. 119, the opinion continues: "'In such a sale there is no foundation for an exception to the general rules of land, or to



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make that a conditional conveyance of trees which would be an absolute conveyance of other property.' . . . Conditions are not to be raised by inference or argument. Conditions subsequent are not favored in law, because they tend to destroy estates, and a vigorous exaction of them is a species of *summum jus*, and in many cases not reconcilable with conscience. . . . Though, where there is no such time limit or condition, there is no forfeiture of title to timber, yet I apprehend that the right to keep the timber standing does not endure forever, and thus encumber the land and prevent its cultivation, but must be removed in a reasonable time. . . . It is claimed that the clause beginning 'together with,' fixes a time limit of six years for removal of the timber. It gives right to enter upon the land and use it for removing and manufacturing the timber, 'free of any rental or charge for six years.' That period in its connection in the sentence only applies to fix the term or limit of freedom from rental. In its place in the deed it has no reference to time fixed for removal of timber. It is immediate in place after, or is a very part of, the clause giving right to use the land for removing and manufacturing timber. Why take it from that clause and carry the six years' provision back over that clause and connect it with the granting clause, and qualify the latter clause by saying that the grant must be used within six years? In place and in sense it belongs to the clause giving the right to occupy the land. It has a function to perform in that clause. It is needed there. It serves only to limit the period during which no charge was to be made for the use of the land. It is no covenant by Barricklow. There is no express covenant by Barricklow to remove the timber at any time. The most we could say as to this is that the deed contemplates a removal, and that thus a covenant to remove is implied. Likely so. But it is only a covenant, not a time limit, not a condition operating as a forfeiture. It would only demand removal in a reasonable time. Delay unreasonable might be the subject of action for breach, or the cause of some legal procedure."



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We find nothing in this case opposed to the conclusion we have reached. On the contrary, it reaffirms the general doctrine announced in *Adkins v. Huff, supra*, in cases where a time limit for the removal of timber appears in a conveyance, to the effect that such covenant is conditional, and the purchaser takes only what timber shall be removed in the time limit, the balance reverting to the owner of the land, or rather remaining his. It holds that in the particular case before it there was no time limit; that it was not a conveyance with a condition operating as a forfeiture; but that inasmuch as the deed contemplated a removal, a covenant to do so was implied, carrying with it a duty of removal within a reasonable time, which if unreasonably deferred might be the subject of action for the breach, or cause for some other legal procedure.

The time fixed, however, by the decree within which the Camp Manufacturing Company might exercise its rights under its contracts does not meet our approval. The opinion of the circuit court (14 Va. L. Reg. 89) does not clearly disclose the considerations which controlled the court in fixing ten years as a reasonable time.

The Camp Manufacturing Company does an enormous business. It owns nearly a thousand millions of feet of lumber, standing upon many thousands of acres of land, upon which it has constructed several plants for converting the trees into lumber, and many tramways and railroads for the transportation of logs and the products of its mills. In determining what is a reasonable time between the parties to this controversy we cannot think that the rights of the appellants should be controlled by the magnitude of the business in which the Camp Manufacturing Company is engaged. In determining what is a reasonable time within which the trees upon the lands of Young and Wright should be removed we should consider the circumstances and conditions affecting the parties to the contract, and the rights of appellants are not to be measured by the convenience or inconvenience, the ability or the inability,

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of the Camp Manufacturing Company, caused by and resulting from the magnitude and extent of its business and its numerous other contracts to which these appellants are strangers. *Young v. Ellis*, 91 Va. 297, 21 S. E. 480.

The Camp Manufacturing Company has, in Young's case, already had fourteen years within which to remove the timber for which it originally paid \$250; in Wright's case the contract was made two years later, and the consideration was \$150. We mention the consideration merely as indicating that the amount of timber conveyed could not have been very great.

Upon the whole case we are of opinion that one year from the certification of the decree of this court to the circuit court is a reasonable time, and in this respect the decree of the circuit court is reversed, with costs to the appellants.

*Reversed in part.*

**Syllabus.**

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**Richmond.**

**WASHINGTON LUNA PARK CO. v. GOODRICH.**

January 13, 1910.

Absent, Buchanan, J.

1. **PLEADING—Declaration—Sufficiency—Injury to Passenger—Collision of Cars.**—In an action for damages by a passenger for hire on a "roller coaster" car operated by an amusement company, a declaration which alleges that the plaintiff was injured by a collision between two of these cars, both of which were operated and controlled by the defendant, and that this collision and the consequent injury was the result of negligence on its part, sufficiently informs the defendant of the case which it will be required to meet, and is good on demurrer. It is unnecessary to describe the construction and operation of the "roller coaster."
2. **DAMAGES—Special Damages—Failure to Allege—Evidence—Harmless Error.**—Where the declaration in an action for a personal injury alleged that the injury hindered and prevented, and would in the future hinder and prevent, the plaintiff (who was the proprietor of a grocery store) from transacting his necessary business affairs, but did not otherwise claim any special damages, the fact that the plaintiff was asked a series of questions about the effect on his business which he could not specifically answer, could not have operated to the prejudice of the defendant, and the verdict of the jury will not, on that account, be set aside.
3. **APPEAL AND ERROR—Exclusion of Evidence—Bill of Exception.**—The exclusion of the answer of a witness to a question is not a ground of error unless the bill of exception shows what answer was expected.
4. **DAMAGES—Excessive—Personal Injury.**—A verdict of \$1,200 for a personal injury cannot be set aside as excessive where it appears that the plaintiff's foot and ankle were injured, and he was rendered wholly unable to attend to business for six weeks, had suffered continuous pain up to time of trial—a period of twenty weeks—and would probably continue to suffer.

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5. VERDICTS—*Quotient—Impeachment by Jurors.*—If jurors agree in advance that each shall put down the amount of his verdict and the aggregate of the sums put down shall be divided by the number of jurors and the quotient be their verdict, this invalidates the verdict if established by competent evidence, but the evidence in the case at bar is not sufficient to establish that fact, and generally jurors should not be permitted to testify to their own misconduct in the jury room.
6. TRIAL—*Agreement of Counsel—Withdrawal—Discretion of Trial Court.*—It is within the discretion of the trial court to permit counsel for a party who has, through inadvertence, assented to a procedure injurious to his client, to withdraw that assent, and object, where it involves no such change of the situation as would operate prejudicially to the other party. If the discretion be abused, it may be corrected upon a writ of error.

Error to a judgment of the Circuit Court of Alexandria county in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

*Affirmed.*

The opinion states the case.

*Moore, Barbour & Keith*, for the plaintiff in error.

*Charles F. Diggs* and *Leo. P. Harlow*, for the defendant in error.

KEITH, P., delivered the opinion of the court.

This was a suit brought against the Washington Luna Park Company, a corporation, by James H. Goodrich, to recover damages for an injury which he received on the 27th of June, 1906.

It appears from the declaration that the defendant company maintained an amusement park and operated a "roller coaster" for the transportation of passengers for hire; that the plaintiff, at the special instance and request of the defendant company, became and was a passenger upon a car operated upon and in connection with said "roller coaster" for a certain reward then

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paid, and it thereby became the duty of the defendant to use due and proper care that the plaintiff should be carried safely on said "roller coaster," but that the defendant, not regarding its duty, did not use due and proper care, but wholly neglected so to do, and so negligently and carelessly maintained, operated and managed the said roller coaster and the cars operated upon the same that while the plaintiff was a passenger for hire, as aforesaid, upon one of the said cars and was in the exercise of due and reasonable care, "the said car collided with another car on the said roller coaster, which collision resulted in an injury to the plaintiff's left leg, ankle and foot, the said leg, ankle and foot being thereby sprained, strained and made sore and stiff and otherwise much wounded and lamed, and they remained so for a long period of time, to-wit, to the present time; and as a result of the said injury the plaintiff became and is still lame in his left foot, leg and ankle, and will ever continue to be, and underwent great pain, mental and bodily anguish, and was hindered and prevented, and will in the future be, from performing and transacting his necessary affairs."

There was a demurrer to this declaration, which the court overruled, and the defendant pleaded not guilty. The trial resulted in a verdict in favor of the plaintiff for \$2,000, which the circuit court reduced to \$1,200 and entered judgment for that sum, and the case is before us upon a writ of error.

The first error assigned is to the ruling of the court upon the demurrer to the declaration.

We are of opinion that the declaration is sufficient. It is true that it does not undertake to describe the construction and operation of a roller coaster, but it does appear that it was one of the many amusement devices operated for hire; that there was more than one car being operated, all of which were under the control of the defendant company; and that the plaintiff was injured by a collision which occurred between two of these cars. We think that this fairly informed the defendant of the case which it would be required to meet. The charge is that

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the plaintiff, without negligence upon his part, having paid the fare or hire required of him, was accepted as a passenger, and upon the invitation of the defendant company took his place upon the roller coaster, which, being negligently operated by the defendant company, came into collision with another roller coaster car operated by the same company, resulting in the injury to the plaintiff of which he complains. The controlling fact stated in the declaration is the collision between the two cars, both of which were operated and controlled by the defendant company, and that this collision and the consequent injury was the result of negligence upon its part.

The next error assigned is to the action of the court in permitting the plaintiff to testify that the injury to his ankle had affected his grocery business, upon the ground that there was no allegation of special damages thus arising in the declaration, and though the plaintiff was unable to give even an estimate of the amount of the damage claimed, thus leaving the jury free to conjecture damage, unhampered even by estimates of the plaintiff himself.

The declaration does allege that the injury hindered and prevented, and will in the future hinder and prevent, him from transacting his necessary affairs and business, as constituting one of the elements of damage which he had suffered. It seems that he was the proprietor of a grocery store, and that he was disabled for a considerable period of time. It is true that he could not state the precise damage which he had sustained, and what appears in the witness' testimony really seems to be a series of questions propounded by counsel for the plaintiff which he was unable specifically to answer. We cannot think that it would operate or could have operated to the prejudice of plaintiff in error.

The third error assigned is to the following question asked Dr. Lemon, who was the attending physician of the plaintiff: "In your talk with Dr. Hudson, when something was said about a suit for damages on the part of Mr. Goodrich, didn't you

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laugh at the idea?" Defendant in error interposed an objection to this question and the objection was sustained by the court. The witness did not answer the question, and it does not appear from the bill of exception what his answer would have been. Were we to reverse the case upon this ground and send it back for a new trial, it might be that Dr. Lemon would answer the question in the negative and say that he did not laugh. It might appear that he had treated the subject, not with levity, but in the most serious manner. But however this may be, we have held time and again that where a question is objected to it must appear what the answer would have been or the court will not consider the objection.

Nor can we set aside the verdict as being contrary to the evidence. That the injury was received as a result of negligence upon the part of the plaintiff in error is sufficiently proved. The injury was sustained in June, 1906, and was of such character that at the time of the trial, in February, 1908, the plaintiff's foot and ankle were still wrapped in a silk-rubber bandage, and he testified that he was unable to attend to business at all for about six weeks, and that he still suffered continuous pain. The testimony of Dr. Lemon was that it was reasonably probable that he would continue to suffer. The jury, as we have seen, rendered a verdict for \$2,000, which the court reduced to \$1,200, and we are unable to say that that sum is excessive compensation for the injury sustained.

It is charged that the jury was guilty of misconduct; that when it came to a consideration of the case the jurors bound themselves by an agreement that each would put opposite his name the amount which he thought the plaintiff should recover; that these figures should be added up, divided by twelve and the quotient would be accepted as the verdict of the jury. Where this is done and the fact is established by competent evidence it is agreed that it invalidates the verdict. The evidence relied upon in this case to prove the fact of the antecedent agreement to return what is known as a quotient verdict is that scraps of

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paper were found in the jury room after it was vacated with the names of the jurymen and the amounts opposite their names. It seems that these several amounts when added together and divided by twelve produced a result or quotient of about \$2,300 or \$2,400; that then a juror suggested that the verdict should be for \$2,000, which was agreed upon.

With respect to this much of the evidence we shall observe that in the first place the scraps of paper relied upon do not establish the fact.

Speaking of such a paper in *Moses v. Cromwell*, 78 Va. 675, this court said: "It is plain that the paper alone does not furnish such evidence as would justify the court in setting aside the verdict of the jury. Nay, it could not be said to raise even a bare suspicion that the verdict was arrived at in an irregular way, for it could not be made to appear that this process of figuration was not gone into purely for the purpose of seeing what the result would be, and that the result was finally adopted as the deliberate judgment of each juror, after full discussion and without any prior agreement to be bound by it."

In this case there is the additional difficulty that the jury were not bound by it, but that a wholly different amount from the quotient ascertained by dividing the sum of the several estimates of the jurors by twelve was established as the verdict.

But an affidavit of one of the counsel is produced, detailing a conversation between himself and one of the jurors to the effect that the verdict was reached by an understanding that each of the jury would write upon a strip of paper the amount he was willing to give the plaintiff, upon the understanding that those amounts would be added together and the aggregate amount divided by twelve; that this was done and an odd amount arrived at, and one member of the jury suggested that it would look strange to render a verdict for this amount; and that thereupon another member of the jury suggested that they make the verdict \$2,000, which was immediately agreed to.

It is said in 4 Minor, Pt. 1 (1st ed.), p. 761, that "Proof by



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the jurors themselves of misbehavior, or of the motives which influenced the jury, or any of them, has been received always with the greatest caution (*Cochran v. Street*, 1 Wash., 80); and the sentiment in opposition has grown progressively stronger, until in general it has come to be established doctrine that jurors are inadmissible for the purpose in question. Such is the apprehension of opening a door to tampering with them, that it is deemed more prudent, upon the whole, to permit even gross irregularities to pass unchallenged rather than to allow any inquiry to be propounded to the jurors touching the conduct of the jury, and especially touching the motives and reasons which influenced their judgment." See *Thompson's Case*, 8 Gratt., 641, 650; *Bull's Case*, 14 Gratt. 613, 626; *Read's Case*, 22 Gratt. 947.

In *Bull's Case*, *supra*, it is said: "In view of all the authorities, and of the reason on which they are founded, we think that, as a general rule, the testimony of jurors ought not to be received to impeach their verdict, especially on the ground of their own misconduct. And, without intending to decide that there are no exceptions to the rule, we think that even in cases in which the testimony might be admissible, it ought to be received with very great caution. A contrary rule would hold out to unsuccessful parties and their friends the strongest temptation to tamper with jurors after their discharge, and would otherwise be productive of the greatest evils."

It appears in this case that when the question was first brought to the attention of the court counsel for defendant in error consented to proof of the conversation with the juror and cross-examined the witness upon the subject. Subsequently the court, on motion of the plaintiff, excluded all of the evidence given as to what transpired between counsel and the juror, and refused to consider the same, and to this ruling of the court the defendant excepted.

In this there was no error. In the first place it was within the discretion of the court to permit the defendant in error to

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withdraw its assent to the introduction of the evidence. Plaintiff in error had certainly suffered no prejudice by its introduction, and if counsel for defendant in error, by inadvertence, had assented to a procedure injurious to his client, it was for the court to say whether or not, under all the circumstances, counsel should be permitted to withdraw the assent and make objection. This we apprehend is frequently done where it has involved no such change of the situation as would operate prejudicially to the other party, and is within the discretion of the trial court—a judicial discretion, it may be, which, if abused, may be corrected upon a writ of error.

But the case before us is yet stronger than the one we have stated, for here the evidence of conversation with a juror, in order to vitiate the verdict, is excluded upon the ground of public policy, and the court should of its own motion have declined to hear the evidence unless the facts brought the case plainly within some exception to the rule. We do not find an exception stated in any of the cases or treatises upon the subject, but it is only suggested in a general way and out of abundant caution that some exceptions may exist.

Upon the whole case we are of opinion that there is no error in the judgment, which is affirmed.

*Affirmed.*

Syllabus.

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**Richmond.**

CHESAPEAKE AND OHIO RAILWAY CO. v. CORBIN'S ADM'R.

November 18, 1909.

Amended March 13, 1910.

Absent, Buchanan, J.

1. RAILROADS—*Licensee—Lookout*.—Where the roadbed of a railroad company at a given point is, and, for a long time, has been, used with the knowledge and tacit consent of the company as a passageway for the general public at all hours of the day and night, persons so using the roadbed are licensees and the company owes them the duty of ordinary care to keep a reasonable lookout for them at such point, and to endeavor to avoid injuring them. If in the discharge of that duty the engineer in charge of a train could have discovered a licensee on the track (under circumstances which would naturally have induced belief in a reasonable mind that he was unconscious of danger) in time to have warned him of his danger or to have stopped the train and avoided injuring him, and failed to do so, the company is liable.
2. RAILROADS—*Negligence—Discovered Peril*.—The doctrine of discovered peril is a qualification of the general rule that the contributory negligence of the person injured ordinarily bars a recovery. The exception involves the principle that, although the plaintiff has been guilty of negligence in exposing himself to peril, he may nevertheless recover if the defendant, after knowing of his danger, could have avoided the injury by the exercise of ordinary care, and failed to do so.
3. RAILROADS—*Personal Injury—License on Track—Lookout—Negligence—Last Clear Chance*.—A licensee, walking on a railroad track at a point where the company owes him the duty of lookout, may recover for an injury inflicted on him by being struck by a train, notwithstanding his own negligence exposed him to the risk of injury, if the injury of which he complains was proximately caused by the omission of the defendant company, after having such notice of licensee's danger as would put a

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prudent man upon his guard, to use ordinary care for the purpose of avoiding such injury. It is not necessary that the company should actually know of the danger to which the licensee is exposed. It is enough if the engineer has sufficient notice or belief to put a prudent man on the alert, and he does not take such precautions as a prudent man would take under similar notice or belief.

4. **RAILROADS—Personal Injury—Licensee on Track—Contributory Negligence—Plaintiff Last in Fault.**—The doctrine that a plaintiff may recover for an injury negligently inflicted on him by the defendant, notwithstanding his own contributory negligence, does not apply where the plaintiff's contributory negligence is, in order of causation, either subsequent to or concurrent with that of the defendant. Therefore, while one negligently walking upon a railroad is generally entitled to recover if an engineer, seeing him, makes no effort to check the train, he cannot recover if, after becoming aware of his danger, he makes no proper effort to escape.

5. **DEMURRER TO EVIDENCE—Court to Decide as Jury Might Have Found.** Upon a demurrer to the evidence, where the evidence is such that the jury might have found for the demurree, it is the duty of the court to enter judgment in his favor.

Error to a judgment of the Circuit Court of Alleghany county in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

*Affirmed.*

The opinion states the case.

*R. L. Parrish*, for the plaintiff in error.

*Charles & Duncan Curry* and *William E. Allen*, for the defendant in error.

WHITTLE, J., delivered the opinion of the court.

This action was brought by the administrator to recover damages of the Chesapeake and Ohio Railway Company for the alleged negligent killing of his intestate, W. W. Corbin.

The writ of error brings under review a judgment for the plaintiff on a demurrer to the evidence.

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The accident occurred in the daytime, within the yard limits, in the town of Covington. The railroad, at that point is double-tracked, and runs nearly east and west; east-bound trains run on the southern track, and west-bound trains on the northern track.

For a year prior to his death, Corbin had been working as a laborer in Covington and the vicinity, and on the occasion of the accident he was walking in a westerly direction on the southern track, and stepped off between the tracks to avoid an east-bound freight train. He walked on between the tracks until the train had passed, and then stepped upon the northern track, crossing it diagonally, and continued his westerly course, walking on the ends of the cross-ties outside the northern rail. He had proceeded in that manner twenty or thirty steps when he was struck from behind by a regular west-bound freight train, and fatally injured.

The general contentions on behalf of the defendant company are that the train, consisting of forty-two empty cars drawn by one of its largest engines, was traversing a curve, which so obstructed the engineer's view of the track that though he was keeping a reasonable lookout through the front window of his cab, he did not and could not discover Corbin until after he was struck. The fireman, it was said, was engaged in firing his engine to enable it to overcome the heavy grade of the Alleghany mountain, and consequently was not in position to keep a lookout along the track from his side of the cab; and, moreover, that the plaintiff's right to recover is barred by Corbin's contributory negligence.

On the other hand the fact is not controverted that the road-bed had long been used, with the knowledge and tacit consent of the company, as a common passageway by the general public at all hours of the day and night. Indeed, it was shown to be more traveled by men, women and children, indiscriminately, than the streets of the town. Under these circumstances Corbin

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was a licensee upon the right of way, to whom the company owed the duty of ordinary care to avoid injuring him.

The evidence for the plaintiff tended to show that the train was running at the rate of ten or twelve miles an hour, and could have been stopped in one hundred and fifty feet; that the curve ends twenty feet east of the point of collision; and that in looking through the front window of the cab on the engineer's side Corbin could have been seen three rail lengths, or ninety feet, from the cab, which would have placed him forty-five feet in front of the pilot. It was likewise shown by actual experiment that, despite the curvature of the track, an engineer leaning out of the side window of his cab (the position which the witnesses for the plaintiff testified the engineer was occupying at the time of the accident) was visible to a person standing on the end of the cross-ties, where Corbin was when the collision occurred, from one hundred and fifty to two hundred yards. The evidence furthermore tended to show that the engineer was looking in Corbin's direction; that Corbin was walking slowly along the ends of the cross-ties with his back toward the approaching train, and with an umbrella in his left hand, hoisted, and the handle resting across his shoulder, and with his dinner bucket in his right hand; that he was apparently wholly unconscious of danger. One of the witnesses, who passed him shortly before he was struck, testified that he appeared to be ill. Under these conditions, the train was run down upon him without abatement of speed, and without ringing the bell, blowing the whistle, or giving any other signal to warn him of danger. Such warning could have been given when the train was fifty feet away, and one step from the end of the cross-tie would have saved his life.

We are of opinion that upon the demurrer to the evidence the record presents a case for the application of the doctrine of *discovered peril*. That doctrine is a qualification of the general rule that the contributory negligence of the person injured or-

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dinarily bars a recovery. The exception involves the principle that, although the plaintiff has been guilty of negligence in exposing himself to peril, he may nevertheless recover if the defendant, after knowing of his danger, could have avoided the injury by the exercise of ordinary care, and fails to do so.

In 29 Cyc. 530, this subject is treated under the sub-heading, "*Injury Avoidable Notwithstanding Contributory Negligence*"; and there is no principle of the law of negligence of more universal application. The text is sustained by decisions of courts of last resort of most of the States of the Union, of the District of Columbia, the United States courts, and the courts of England and Canada; and in no jurisdiction has the principle been more repeatedly announced than by this court. *R. & D. R. Co. v. Anderson's Admr.*, 31 Gratt. 812, 31 Am. Rep. 750; *Clark's Admr. v. Same*, 78 Va. 709, 49 Am. Rep. 394; *Farley's Admr. v. Same*, 81 Va. 783; *Va. M. Co. v. Boswell's Admr.*, 82 Va. 932, 7 S. E. 383; *C. & O. R. Co. v. Lee*, 84 Va. 642, 5 S. E. 579; *Seaboard & Roanoke R. Co. v. Joyner's Admr.*, 92 Va. 354, 23 S. E. 773; *Washington & So. R. Co. v. Lacy*, 94 Va. 460, 26 S. E. 834; *Kimball & Fink v. Friend*, 95 Va. 125, 27 S. E. 901; *N. & W. Ry. Co. v. Wood*, 99 Va. 156, 37 S. E. 846; *Humphrey's Admx. v. Valley Railroad Co.*, 100 Va. 749, 42 S. E. 882; *Richmond Traction Co. v. Clarke*, 101 Va. 382, 43 S. E. 618; *Same v. Martin's Admr.*, 102 Va. 209, 45 S. E. 886; *Green's Admr. v. Southern Ry. Co.*, 102 Va. 791, 47 S. E. 819; *Savage v. Same*, 103 Va. 422, 49 S. E. 484; *Brammer v. N. & W. Ry. Co.*, 104 Va. 50, 51 S. E. 211; *C. & O. Ry. Co. v. Farrow*, 106 Va. 137, 55 S. E. 569; *N. & W. Ry. Co. v. Denny*, 106 Va. 383, 56 S. E. 321; *Same v. Dean*, 107 Va. 505, 59 S. E. 389; *Same v. Davis*, 108 Va. 514, 62 S. E. 337; *Roanoke Ry., etc., Co. v. Young*, 108 Va. 783, 62 S. E. 691; *N. & P. Tr. Co. v. O'Neill*, 109 Va. 670, 64 S. E. 948; *N. & W. Ry. Co. v. Sollenberger*, ante, p. 606, 66 S. E. 726.

In *Seaboard & R. Co. v. Joyner*, supra, the court approved an instruction "that though the plaintiff may have been guilty

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of contributory negligence, and although that negligence may in fact have contributed to the accident, yet if the jury believed that the defendant could in the result—that is, after it discovered his peril—by the exercise of proper care and due diligence have avoided the mischief which happened, the plaintiff's negligence will not excuse it."

In the present case the jury would have been warranted in drawing the inference from the evidence that the engineer had *actual* knowledge of Corbin's peril. But it is not necessary to rest the case upon inference. It is clear that Corbin was a licensee upon the premises of the railway company, to whom its servants owed the duty of keeping a reasonable lookout to avoid injuring him. If in the discharge of that duty the engineer could have discovered Corbin's presence on the track (under circumstances which would naturally have induced belief in a reasonable mind that he was unconscious of danger) in time either to have warned him of the approach of the train or to have stopped it and avoided the accident, and failed to do so, then the company would be liable.

In *Blankenship v. C. & O. Ry. Co.*, 94 Va. 449, 27 S. E. 20, it was held that, where a railroad company knows that its right of way is constantly used as a footway by the public, it is the duty of the servants of the company to exercise reasonable care to discover persons so using the right of way, and to endeavor to avoid injuring them.

In *Williamson v. Southern Ry. Co.*, 104 Va. 146, 153, 51 S. E. 195, 197, 113 Am. St. Rep. 1032, 70 L. R. A. 1007, the court said: "The obligation is not an absolute one to discover the plaintiff, but it is only the duty of using ordinary care to keep a reasonable lookout under the conditions and circumstances existing at the time the point is reached where the licensee may be reasonably expected."

In *N. & W. Ry. Co. v. Carr*, 106 Va. 508, 56 S. E. 276, it was held: "It is the duty of those in charge of a railroad train to keep a reasonable lookout at places constantly used with the



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knowledge of the company at all hours of the day by large numbers of men, women and children, and for an injury proximately resulting from a failure to keep such lookout the company is liable."

So, in Shear. & Red. on Neg. (4th ed.) sec. 484, it is said: "A railroad engineer is not bound, usually, to foresee the wrongful presence of any person upon the track, even where it was open to an adjoining highway; nor to foresee the wrongful entry of persons on its cars; but if his experience has shown that persons are constantly thus entering upon the tracks or the cars, such persons, if injured by reason of the engineer's failure to use ordinary care to keep watch for them, may recover damages if the engineer could have seen them without difficulty had he kept a reasonable watch, even though in fact he did not see them. This qualification of the general rule has been sometimes denied, but incorrectly."

At section 99 the learned authors observe: "The plaintiff should recover, notwithstanding his own negligence exposed him to the risk of injury, if the injury of which he complains was proximately caused by the omission of the defendant, after having such notice of the plaintiff's danger as would put a prudent man upon his guard, to use ordinary care for the purpose of avoiding such injury. It is not necessary that the defendant should actually know of the danger to which the plaintiff is exposed. It is enough if he has sufficient notice or belief to put a prudent man on the alert, and he does take such precautions as a prudent man would take under similar notice or belief." 1 Thomp. on Neg., sec. 1737.

In Shear. & Red. on Neg. (5th ed.), sec. 101, it is said: "*Plaintiff Last in Fault.*—The foregoing rule obviously does not apply where the plaintiff's contributory negligence is, in order of causation, either subsequent to or concurrent with that of the defendant. Therefore, while one negligently walking upon a railroad is generally entitled to recover if an engineer, seeing him, makes no effort to check the train, he cannot recover if,

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after becoming aware of his danger, he makes no proper effort to escape.”

In the case in judgment the negligence of the plaintiff's intestate in walking along the ends of the cross-ties is conceded, and such negligence would have barred a recovery but for the negligence of the engineer (who upon the testimony, viewed as upon a demurrer to evidence, must be held to have discovered the peril in which Corbin was placed) in failing to exercise proper care to avert the mischief which happened. Whether or not he discharged that duty is a question of fact about which reasonably fair-minded men, upon the evidence, might differ. If the jury chose to believe the witnesses for the plaintiff, their testimony was quite sufficient to have warranted them in finding a verdict for the plaintiff, and the rule is well settled that where the jury might have so found on the defendant's demurrer to the evidence, the court must so find. *Bass v. Norfolk Ry., etc., Co.*, 100 Va. 1, 40 S. E. 100; *Fisher v. C. & O. Ry. Co.*, 104 Va. 657, 52 S. E. 377, 2 L. R. A. (N. S.) 954.

*Affirmed.*

Statement.

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**Richmond.**

**BANK OF PHOEBUS v. BYRUM.**

March 10, 1910.

Absent, Buchanan, J.

1. **ATTACHMENTS—Non-residents—Soldiers in Service—Residents on Land Ceded to United States—Right of State to Serve Process.**—A person born and domiciled in another State, who comes to Fortress Monroe (which is within the territorial limits of this State, but under the exclusive jurisdiction of the United States), for the purpose of enlisting in the army, and enlists and remains an enlisted soldier of the United States, does not thereby acquire a residence in this State so as to defeat the right of a creditor to attach his property in this State on the ground that he is a non-resident. The mere fact that the State has the right to serve process, civil and criminal, in the territory ceded to the United States does not affect the personal status of one resident in such territory. The power to serve process on the defendant is not the test of the right to issue an attachment against him as a non-resident.
2. **UNITED STATES—Ceded Territory—Jurisdiction Over Residents—Service of Process of State.**—The reservation, in the deed of cession of land from this State to the United States, of the right to serve civil and criminal process of the State in the territory ceded does not interfere in any way with the supremacy of the United States over the territory ceded, but is permitted to prevent it from becoming an asylum for fugitives from justice. Such territory is no longer a part of the State, nor subject to the jurisdiction of its courts. Persons residing there are not citizens of Virginia.

Error to a judgment of the Circuit Court of Elizabeth City county in an action of debt with an ancillary attachment. Judgment for the defendant. Plaintiff assigns error.

*Reversed.*

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The opinion states the case.

*W. H. Power and Batchelor & Phillips*, for the plaintiff in error.

*Sidney J. Dudley and C. Vernon Spratley*, for the defendant in error.

KEITH, P., delivered the opinion of the court.

The Bank of Phoebus brought an action of debt against Byrum in the Circuit Court of Elizabeth City county, upon a negotiable note for \$589, which was due and payable, and sued out an attachment and served the same upon the Merchants National Bank of Hampton, which had in its possession money belonging to the defendant. The defendant moved the court to quash the attachment on the sole ground that it was sued out on false suggestion; the defendant being a resident of the State of Virginia.

Byrum was born in North Carolina and resided there continuously until 1898, when he came to Fortress Monroe and enlisted as a soldier in the army of the United States, in which service he has continued until the present time. Upon this evidence the court, being of opinion that the defendant was a resident of Virginia, sustained the motion to quash the attachment, and that judgment is before us upon a writ of error.

The territory known as Fortress Monroe was, by act of the General Assembly of Virginia of 1820, and a deed made in pursuance of that act, ceded and conveyed to the United States. It was acquired by the United States for military purposes, and has been and is now held for such uses and purposes.

It is provided by the Code of this State, section 15-a, paragraph 2, that "exclusive jurisdiction in and over any land so acquired by the United States shall be, and the same is hereby, ceded to the United States for all purposes except the service

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upon such sites of all civil and criminal process of the courts of this State; but the jurisdiction so ceded shall continue no longer than the said United States shall own such lands.”

The fact that process can or cannot be served upon a defendant is not the test of the right to issue an attachment against him as a non-resident.

In Shinn on Attachments, section 103, it is said: “Where one is in fact a non-resident, his property will be liable in a foreign attachment, notwithstanding the fact that the defendant may be in the State at the time it is sued out. Nor will the allegation of non-residence be defeated by the fact that the defendant is personally served. The effect of such personal service will, of course, be to give the court jurisdiction to enter a general judgment and issue an execution, not only against the property attached but generally against the defendant and all of his property.” And to the same effect see *Clarke v. Ward*, 12 Gratt. 440; *Long v. Ryan*, 30 Gratt. 721; *Didier v. Patterson*, 93 Va. 541, 25 S. E. 661.

The real question here is whether or not a person born and domiciled in North Carolina, who comes to Fortress Monroe for the purpose of enlisting in the army, enlists and remains an enlisted soldier of the United States, thereby acquires a residence in this Commonwealth so as to defeat the right of a creditor to issue an attachment against him. If the power to serve a process were the test, clearly the reservation made by the State would be sufficient to cover this case, but that reservation of right to serve a process has nothing to do with the personal status of the individual.

In the case of *United States v. Cornett*, 2 Mason 60, Mr. Justice Story said: “There is nothing incompatible with the exclusive sovereignty or jurisdiction of one State that it should permit another State in such cases to execute its process within its limits. And a cession of exclusive jurisdiction may well be made with a reservation of a right of this nature, which then operates only as a condition annexed to the cession, and as an

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agreement of the new sovereign to permit its free exercise as *quod hoc*, his own process. This is the light in which clauses of this nature (which are very frequent in grants made by the States to the United States) have been received by this court on various occasions, on which the subject has been heretofore brought before it for consideration, and it is the same light in which it has also been received by a very learned State court"—citing *Commonwealth v. Clary*, 8 Mass. 72.

In *Foley v. Shriver*, 81 Va. 573, the question was whether the National Home for Disabled Volunteer Soldiers was subject to the jurisdiction of the Circuit Court of Elizabeth City county, and this court said: "In this case the State legislature having given the required consent, and the United States having purchased the land in question, the United States have acquired, under the Federal Constitution, exclusive jurisdiction over the ceded lands, and they are no longer a part of the State of Virginia, and are not subject to the jurisdiction of the State courts. Persons residing there are not citizens of Virginia; the property situated there is not subject to the control or disposal of any State court; and the Circuit Court of Elizabeth City county is without jurisdiction within said territory."

In Jacobs on the Law of Domicile, sec. 303, it is said: "Neither *quasi* national nor municipal domicile of a person is affected by his enlistment or acceptance of a commission in the military or war marine service of his country. He does not thereby lose the *quasi* national or municipal domicile which he had when he entered the service, nor does he acquire [one] at the place where he serves."

In *Lyon v. Vance*, 46 W. Va. 781, 34 S. E. 761, where a resident of the State of West Virginia entered the volunteer service of the United States, and with his regiment went beyond the limits of the State, and remained for some time in such service, it was held that he did not thereby become a non-resident of the State, within the meaning of the attachment law; and, that being the only ground of attachment against him, a

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valid attachment could not on that ground be sued out against his property.

In *Ft. Leavenworth R. Co. v. Lowe*, 114 U. S. 525, 29 L. Ed. 264, 5 Sup. Ct. 995, the Supreme Court says: "When the title is acquired by purchase by consent of the legislatures of the States, the Federal jurisdiction is exclusive of all State authority. This follows from the declaration of the Constitution that Congress shall have 'like authority' over such places as it has over the district which is the seat of government; that is, the power of 'exclusive legislation in all cases whatsoever.' Broader or clearer language could not be used to exclude all other authority than that of Congress; and that no other authority can be exercised over them has been the uniform opinion of Federal and State tribunals, and of the Attorneys General. The reservation which has usually accompanied the consent of the States that civil and criminal process of the State courts may be served in the places purchased, is not considered as interfering in any respect with the supremacy of the United States over them; but is admitted to prevent them from becoming an asylum for the fugitives from justice."

For the foregoing reasons we are of opinion that the defendant in error did not acquire a residence in the State of Virginia by reason of having enlisted in the army of the United States and resided as such enlisted soldier at Fortress Monroe; that, being a non-resident, his property was subject to attachment; and that the judgment of the circuit court must be reversed.

*Reversed.*

## Syllabus.

**Richmond.****BEAVERS' ADMINISTRATRIX V. PUTNAM'S CURATOR.**

March 10, 1910.

Absent, Buchanan and Whittle, JJ.

1. **SUBSISTENCE OF ACTIONS—Personal Injuries—Common Law Rule—Death by Wrongful Act—Virginia Statute.**—At common law personal actions died with the person and could not be revived either by or against the personal representative, and this rule has not been altered in this State in respect of an injury done to the person. Such an action still dies with the person, and no right of action for such an injury survives to his personal representative. The right of action given by the Virginia statute for death by wrongful act is not a survival action, but an independent right of action created, and not merely continued, by the statute.

2. **DEATH BY WRONGFUL ACT—Death of Wrongdoer Before Victim—Code, Sections 2902, 2903, 2906.**—If a party inflicts a mortal wound on another and then dies before his victim, no action lies in favor of the representative of the victim against the representative of the wrongdoer, either at common law or in Virginia. Immediately upon the infliction of the wound there came into being a right of action at common law against the wrongdoer, but this perished with the death of the victim, and did not survive to his personal representative. The new right of action given by the statute to the personal representative of the victim did not come into being until his death, but, when that occurred, the right of action had been lost because of the death of the wrongdoer, which occurred before the right of action accrued which was called into being by the statute. Sections 2902 and 2903 of the Code did not give any right of action for a personal tort against the personal representative of one who was dead at the time the right accrued, but only against a living wrongdoer, and it is only the right of action under these sections which section 2906 declares shall not determine by the death of the defendant.

3. **COMMON LAW—Change by Statute.**—The common law is the law of this State and remains in force except so far as it is changed by statute.

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Error to a judgment of the Circuit Court of Fairfax county in an action of trespass on the case. Judgment for the defendant. Plaintiff assigns error.

*Affirmed.*

The opinion states the case.

*Leo P. Harlow and Wolf & Rosenberg*, for the plaintiff in error.

*C. Vernon Ford*, for the defendant in error.

KEITH, P., delivered the opinion of the court.

Elizabeth Beavers was shot by Silas W. Putnam and a few hours thereafter died from the effects of the wound she had received. Putnam then shot himself, dying in a very short time thereafter, his death preceding that of Elizabeth Beavers. The administratrix of Elizabeth Beavers brought suit against the curator of Silas Putnam, the declaration stating the foregoing facts, and claiming damages to the amount of \$10,000.

The defendant demurred to this declaration, and for cause of demurrer alleges that the declaration shows no lawful cause of action against the defendant, nor any wrong or trespass committed by him; that it is not competent to sue the curator for the tort alleged to have been committed by the curator's decedent; and that it is necessary for the declaration to show and allege that at the time of the death of plaintiff's intestate the defendant's intestate was alive, otherwise on death of defendant's intestate the alleged cause of action abated, and died at common law, and is not kept alive by statute.

There are other specifications of grounds of demurrer, but those to which we have referred sufficiently present the questions to be considered.

At common law it is conceded that personal actions died with the person and could not be revived, either by or against the personal representatives; but at an early day (4 Edw. III, chap.

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7,) a right of action was given to executors for goods and chattels of their testators carried away in their lifetime, and by section 2655 of our Code it is provided that "for the taking or carrying away any goods, or the waste or destruction of, or damage to, any estate of or by his decedent, a personal representative may sue or be sued.

Discussing this subject in *Anderson v. Hygeia Hotel Co.*, 92 Va. 687, 24 S. E. 269, Judge Riely said: "But while the rule of the common law has been much restricted and limited by statutes, both in England and in this country, and the right to sue for an injury done to the property or estate of the decedent in his lifetime has been conferred on the personal representative of the deceased, the rule has not been altered in this State in respect of an injury done to the person. An action for an injury to the person still, as at common law, dies with the person, and no right of action for such injury survives to his personal representative."

It was claimed in that case, that by virtue of sections 2902, 2903 and 2906 of our Code, the right of action for injury to the person, produced by the wrongful act, neglect or default of another, survived to the personal representative, so that the limitation upon such right of action would be five years and not one year; but it was there held that such was not the effect of those sections; that the right of action given by them is not a survival of the right of action which existed in the injured person prior to his death, but an independent right of action, created and not merely continued by our statutes.

"The act requires the suit to be brought by and in the name of the personal representative, but he by no means sues in his general right of personal representative. He sues wholly by virtue of the statute and in respect of a different right. His suit proceeds on different principles. He sues not for the benefit of the estate, but primarily and substantially as trustee for certain particular kindred of the deceased, who are designated in the statute." *Anderson v. Hygeia Hotel Co.*, *supra*.

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There can be no doubt that at common law the action in this case could not have been maintained, and it remains only to be considered whether or not it is such an action as is contemplated by sections 2902, 2903 and 2906 of the Code of Virginia.

By section 2902 it is provided that "Whenever the death of a person shall be caused by the wrongful act, neglect, or default of any person or corporation, or of any ship or vessel, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action, or to proceed *in rem* against said ship or vessel, or *in personam* against the owners thereof, or those having control of her, and to recover damages in respect thereof, then, and in every such case, the person who, or corporation or ship or vessel which, would have been liable, if death had not ensued, shall be liable to an action for damages, or if a ship or vessel, to a libel *in rem*, and her owners or those responsible for her acts or defaults or negligence to a libel *in personam*, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to a felony."

It appears from this declaration that the plaintiff's intestate, having been mortally wounded by defendant's intestate, survived for some hours and died; that in the meantime defendant's intestate inflicted a mortal wound upon himself, of which he died, his death preceding that of his victim. When Mrs. Beavers received the wound from which she died at the hands of Putnam, there instantly came into being in her behalf a right of action against Putnam for the injury which she had sustained, a right of action at common law, which at common law perished upon her death and did not survive to her personal representative. *Anderson v. Hygeia Hotel Co., supra*. The right of action given to her personal representative by the statute did not come into being until her death, but when that occurred the right of action had been lost because of the death of the wrongdoer, which occurred before the right of action accrued which was called into being by the statute.

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The common law is the law of the land and remains in force, except in so far as it is changed by statute. *Milhiser v. Gallego Mills Co.*, 101 Va. 579, 44 S. E. 760.

Section 2902 does change the common law by giving in express terms an action for damages to the personal representative of the party injured, where death ensues from the wrongful act, neglect or default of a person or corporation. That section, however, is silent with respect to the death of the wrongdoer, and in that respect does not change the common law.

Section 2903 provides that the action given by section 2902 shall be brought in the name of the personal representative of the deceased person within twelve months after his or her death, and then declares that the jury may award such damages as may seem just and fair, not exceeding ten thousand dollars, and directs in what proportion and to whom they shall be distributed.

Section 2906 is as follows: "The right of action under section 2902 and 2903 shall not determine, nor the action when brought abate, by the death of the defendant or the dissolution of the corporation when a corporation is the defendant; and where an action is brought by a party injured for damage caused by the wrongful act, neglect or default of any person or corporation and the party injured dies pending the action, the action shall not abate by reason of his death, but, his death being suggested, it may be revived in the name of his personal representative."

If any part of this section gives, or was intended to give, preserves or has the effect of preserving, a right of action such as that under consideration, it is to be found in the following language of the section: "The right of action under sections 2902 and 2903 shall not determine . . . by the death of the defendant . . . ." But if the analysis of section 2902 which we have made be accurate, no right of action ever existed which could be determined by the death of the defendant. The right of action which came into being when the injury was received

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perished at common law by the death either of the wrongdoer (which first occurred) or the injured person, which took place immediately thereafter; so that the condition had never arisen under which the right of action conferred by the statute upon the administratrix could be maintained, which, we repeat, upon the authority of *Anderson v. Hygeia Hotel Co.*, *supra*, was not a survival of the right which had existed in Mrs. Beavers, but an independent right conferred upon her administratrix by statute, and never had any existence, because when Mrs. Beavers died and the right of action accrued in favor of her administratrix by virtue of the statute, there was no one in being who could be sued—not Silas Putnam, for he had pre-deceased his victim; not his administrator, because at common law the administrator could not be sued upon such a cause of action, and the statute does not create as against the defendant an independent cause of action.

Section 2906, in other words, creates no new cause of action; it merely attaches itself to such causes of action as were created by sections 2902 and 2903, and provides that they shall not be determined by the death of the defendant. To say that an existing cause of action shall not be determined by the happening of an event does not in and of itself create an independent cause of action.

Counsel for defendant in error has cited a number of decisions from courts of great respectability construing statutes of a similar character and which seem to maintain the view we have taken. See *Bates v. Sylvester*, 205 Mo., 493, 104 S. W., 73, 120 Am. St. Rep. 761, 11 L. R. A. (N. S.) 1157, and note. We will not prolong this opinion by a discussion of these authorities, but will rest our conclusion upon the construction of the statute, aided by the Virginia decisions to which we have referred.

For these reasons we are of opinion that the judgment of the circuit court should be affirmed.

*Affirmed.*

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Statement.

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**Richmond.****BLAKEMORE'S ADMINISTRATOR AND OTHERS v. ROLLER AND OTHERS.**

March 10. 1910.

1. JUDICIAL SALES—*Confirmation—Excessive Quantity—Objection—Laches.*—If parties to a suit know or ought to know that a tract of land designated in the record and the decree for sale as the “ten-acre tract” in fact contains thirteen acres, and permit it to be sold as ten acres, and the sale confirmed without objection, they cannot thereafter hold the purchaser liable for the excess, as for a sale by the acre merely because the tract was spoken of as the ten-acre tract, in the absence of any evidence of fraud, misrepresentation or mistake as to the quantity sold, or of any belief on the part of the purchaser at the time of sale that the boundary contained any more than was represented.
2. JUDICIAL SALES—*Confirmation—Variation in Quantity of Land—Reservations After Confirmation.*—No increase or abatement of the purchase price of land sold at a judicial sale will be permitted for excess or deficiency in quantity after a confirmation of such sale, except in cases of fraud, misrepresentation, or mutual mistake. After such confirmation, a reservation in a subsequent decree for a deed to the purchaser of the right to proceed against him for excess in quantity of the land sold is ineffectual to affect the rights of such purchaser.

Appeal from a decree of the Circuit Court of Rockingham county on a demurrer to a petition filed in the cause of *Cline v. Blakemore*. Decree for defendants. Petitioners appeal.

*Affirmed.*

The opinion states the case.

*Roller & Martz* and *D. O. Dechert*, for the appellants.

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*John E. Roller*, for the appellees.

BUCHANAN, J., delivered the opinion of the court.

This case was heard in the trial court upon a demurrer to a petition filed by the appellants in the cause of *Cline v. Blake-more* and the causes heard therewith. The grounds of demurrer assigned were that the papers and proceedings in the causes in which the petition was filed show that the petitioners had no interest in the fund sought to be recovered, and that the "petition does not contain any matter of equity whereon said court can ground any decree or give the plaintiffs any relief against this defendant."

The court sustained the demurrer upon the last-named ground and dismissed the petition. From that decree this appeal was taken.

The petition and the proceedings in the causes in which it was filed show that a lien debtor in the causes owned, among other lands, a tract of nineteen acres. Off of this tract had been sold about six acres, and on ten acres of the undivided residue he gave a deed of trust to secure a debt due a building association. Afterwards on the whole of the remnant he gave another deed of trust to secure a debt due the petitioners and those whom they represent. A decree was subsequently entered for the sale of the tract described as the ten-acre tract, but which tract, as the proceedings show and as is admitted in the petition of the appellants, was the remnant of the nineteen-acre parcel, and contained, as appeared from a subsequent survey, something over thirteen acres. This parcel of land was sold to R. H. Sites by the commissioners of the court for the lump sum of \$1,030, one-fourth cash and the residue on time. The sale was reported to the court and confirmed at the October term, 1898. Subsequent to the confirmation of said sale John E. Roller, the appellee, acquired Sites' interest in the land. At the August term, 1901, upon the application of Roller, there was a decree for the survey

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of the land, and afterwards a report showing that the tract sold contained over thirteen acres. At the April term, 1903, the surveyor's report was confirmed, the decree declaring that Roller had paid all the purchase price and was entitled to a deed, and directed a deed to be made to him, "but without prejudice to the right of the parties in interest, by subsequent proceedings in the cause, to assert a liability on said John E. Roller for the excess in the quantity of the land purchased by him as aforesaid."

The contention of the appellants is that, as the "ten-acre tract" purchased by Sites and assigned to Roller was sold for ten acres when in fact it contained over thirteen (being, as they claim, a sale by the acre and not in gross), they are entitled to recover from Roller the sum of \$384.97, the value of the land in excess of ten acres. There is no charge in the petition that there was any fraud, misrepresentation or mistake as to the quantity of land sold. There is nothing in the record to show that when Sites purchased all the parties to the record did not know, or by examination of the record could not have known, that the "ten-acre tract" was the residue of the nineteen-acre tract. Especially would this fact have been known to the appellants since William H. Blakemore, one of them, and C. H. Blakemore, the intestate of the other appellant, were former owners of the said nineteen-acre parcel, and the debt which they are now asserting was secured by a deed of trust upon it.

The record, as before stated, shows that the remnant of the nineteen-acre tract not alienated by Coyner was directed to be and was sold to Sites.

It being a judicial sale, as was said by Judge Burks in *Long v. Weller*, 29 Gratt. 347, 353, "the records of the court and the papers in the cause were the only reliable sources of information as to the property to be sold, the title, boundaries, etc." It was not only the duty of the purchasers to look to the records and papers in the causes to see what land they were purchasing, but it was the duty of the appellants who were parties to the suit



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claiming an interest in the proceeds of sale to have informed themselves of what was being sold. The sale was for the lump sum of \$1,030. That it was a sale by the acre and not in gross can only be inferred from the fact that it was spoken of or called the ten-acre tract.

There is nothing in the record to show that Sites, when he purchased from the court, or that Roller, when he purchased from Sites, did not believe that the tract did contain more than ten acres, and the appellants and those they represent, from their connection with the land and the suit, must have known it. Having this knowledge, if they wished to assert a claim against Sites that he should pay more for the land than the lump sum he bid for the property, they should have made known their claim before the confirmation of the sale. Having permitted the sale to be confirmed at the price offered by Sites when they knew, or ought to have known, that the "ten-acre parcel" contained more than ten acres, they have lost their equity, as the trial court properly said, if they ever had any.

The reservation in the decree directing a deed to be made to Roller could not enlarge the rights of the appellants. It seems to be settled law in this State that an increase or an abatement of the purchase price of land sold at a judicial sale will not be permitted for excess or deficiency in quantity after a confirmation of such sale, except in cases of after-discovered fraud, misrepresentation or mutual mistake. See *Watson v. Hoy*, 28 Gratt. 698, and cases cited; *Long v. Weller*, 29 Gratt. 347, and cases cited; *McComb v. Gilkerson*, ante, p. 406, 66 S. E. 77.

We are of opinion that there is no error in the decree complained of, and that it should be affirmed.

*Affirmed.*

Statement.

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**Richmond,**

**CHESAPEAKE AND OHIO RAILWAY CO. v. CHRISTIAN'S ADMIN-  
ISTRATRIX.**

March 10, 1910.

1. **VERDICTS—*Conflicting Evidence—Discrepancies.***—The verdict of a jury will not be set aside if there is evidence sufficient to sustain it, although there may be conflicts and discrepancies in the oral testimony of the prevailing party. It is the province of the jury to reconcile these, if possible, and if not to give credence to the witness or witnesses who, in their judgment, are best entitled to it.
2. **NEW TRIAL—*Conflicting Evidence—Verdict Conclusive.***—Where the evidence on a material question in a case is conflicting, the verdict of the jury is conclusive on the court on a motion for a new trial.
3. **INSTRUCTIONS—*Negligence and Contributory Negligence—Conflicting Evidence.***—Where, in a personal injury case, the evidence is conflicting both as to the negligence of the defendant and the contributory negligence of the plaintiff, it is proper to instruct the jury on each of the points.
4. **MASTER AND SERVANT—*Safe Appliances—Evidence—Railroads.***—The fact that the engine which inflicted the injury complained of passed several times over a particular portion of a railway track on the morning of the accident, without injury to the engine, track or crew, is a circumstance to be considered in determining whether or not the engine, or the roadway or track was in a reasonably safe condition for the use of employees of the company, but is not conclusive evidence of that fact.
5. **APPEAL AND ERROR—*Improper Evidence—Harmless Error.***—The answer of a witness which shows that he has no knowledge on the subject of inquiry, if error, is harmless.

Error to a judgment of the Circuit Court of the city of Clifton Forge in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

*Affirmed.*

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Opinion.

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The opinion states the case.

*R. L. Parrish*, for the plaintiff in error.

*Charles & Duncan Curry* and *F. W. King*, for the defendant in error.

BUCHANAN, J., delivered the opinion of the court.

The intestate of the defendant in error was run over and killed by an engine of the plaintiff in error, the Chesapeake and Ohio Railway Company, and this action was brought to recover damages therefor.

The deceased was a yard conductor in the service of that company in its yard at Clifton Forge, Va., and was either thrown or fell from the step of the engine upon which he was standing and run over by it.

The plaintiff's contention is, and there is evidence which shows, that on the day of the accident her intestate, in the discharge of his duty, was standing on the step in front of the engine, which step was not properly fastened at the ends (of which the railroad company had notice), and was worm-eaten and otherwise defective; that the ends of the rails of the track upon which the engine was running at the place of the accident would sink or give down when the engine passed over them; that the boards or plank laid lengthwise between the rails at that point were not fastened at their ends to the ties as they should have been, so that the result was that as the engine passed that point the track sunk and the ends of the boards did not, but stuck up, striking the step upon which the deceased was standing, breaking it and throwing him off in front of the engine, which ran over him.

The railway company, on the other hand, insists that the evidence shows that the deceased at the time of the accident was standing on the step in front of the engine, running at from ten

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to twenty-five miles an hour, without holding to anything, and was therefore guilty of such negligence on his part as deprives the plaintiff of the right to recover, even if the railway company was negligent, which is denied.

The railway company claims that the trial court committed three errors to its prejudice in the trial of the cause. The first error assigned, and that chiefly relied on, is that the verdict is contrary to the law and the evidence, and that the trial court erred in not setting it aside.

The evidence not only tends to establish the facts relied on by the plaintiffs to sustain her recovery, but is sufficient to sustain it, if the jury saw proper to believe the witnesses introduced by her. It is quite true, as the learned counsel for the railway company argues, that some of the material witnesses for the plaintiff contradict themselves and each other in their testimony, and give an unsatisfactory account of what they claim to have seen; but, as was said in the recent case of *Southern Railway Co. v. Cash*, ante, p. 282, 65 S. E. 601, the court cannot, on a motion to set aside the verdict of the jury, invade the province of the jury to pass upon the credibility of the witnesses, to reconcile their conflicting statements or determine the weight to be given the evidence of each. If there are conflicts or discrepancies in the oral testimony, it is the province and duty of the jury to reconcile them if possible, and if this cannot be done the jury may give credence to the witness or witnesses who in their judgment are best entitled to it.

That the evidence of the plaintiff made out a case of negligence against the railway company, if the jury believed the statement of the witnesses most favorable to her contention, is not seriously controverted by the railway company, but its counsel earnestly insists that the evidence shows that the plaintiff's intestate was guilty of contributory negligence in standing upon the front step of a rapidly moving engine without taking measures for his own safety.

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The preponderance of evidence is that the deceased was not holding to anything while in that dangerous position; but two witnesses, Rapp and Vest, testify that he was holding on at the time of the accident. Upon this evidence the question of contributory negligence was clearly one for the jury, and their finding upon it is conclusive upon the court if the case was properly submitted to them.

The next assignment of error is to the action of the court in giving instructions one, two and three offered by the plaintiff, and in rejecting instruction numbered two asked for by the defendant.

The objection made to the said instructions offered by the plaintiff is that they were not applicable to or justified by the evidence. The contention of the defendant company is, as above stated, that the evidence clearly shows that the plaintiff's intestate was guilty of contributory negligence, and that the plaintiff was not entitled to recover, even if the defendant was guilty of the negligence charged.

The objection to these instructions is based upon a mistaken view of the testimony. The evidence is conflicting upon the question of contributory negligence of plaintiff's intestate as well as upon the negligence of the defendant. Instructions were therefore proper upon each of these points. As we understand the defendant's objection, it is not contended that the language of the said instructions was objectionable, or did not properly submit those questions to the jury if they were applicable to the facts of the case.

The defendant's instruction No. 2, which the court declined to give, was properly refused. The latter part of it is as follows: "And they (the jury) are further instructed that if they believe from the evidence that the accident in this case was such as could not have been reasonably expected by the defendant to occur, *and that the engine that caused the same had on the morning of the accident several times gone over the point of accident without injury to engine, track or crew, then they should find for the defendant.*"

**Opinion.**

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The portion italicized was clearly erroneous. The engine may have passed over the track where the accident occurred several times that morning without injury to the engine, track or crew, and yet the step, plank and track have been in the condition charged in the declaration. The fact that the engine may have passed several times over a particular portion of railway track on the morning of the accident was a circumstance to be considered in determining whether or not the step, roadway or track was in a reasonably safe condition for the use of the company's employees, but was not conclusive evidence of that fact.

The remaining assignment of error is to the admission of certain evidence.

On the cross-examination of one of the defendant's witnesses he was asked the following question: "Are the boards down there on the track now as they were?" (that is, when and where the accident occurred). This question was objected to on the ground that the changed condition of the yard was not proper evidence to go to the jury. The answer of the witness shows that he had no knowledge on the subject, and the evidence could not have prejudiced the defendant.

We are of opinion that there is no error in the judgment, and that it must be affirmed.

*Affirmed.*

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Statement.

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**Richmond,****CHESAPEAKE AND OHIO RAILWAY CO. v. MELTON.**

March 10, 1910.

Absent, Buchanan and Whittle, JJ.

1. **PLEADING—Declaration—Sufficiency**—A declaration is good which states sufficient facts to enable the court to say, upon demurrer, whether, if the facts stated were proved, the plaintiff would be entitled to recover.
2. **PLEADING—Object of Declaration—How Negligence Should Be Averred**.—The office of a declaration is to inform the defendant of the case he has to meet, so that he may have a reasonable opportunity to prepare his defense. The evidence to sustain the case stated, of course, need not be pleaded, but it is not enough to say that the plaintiff was injured as the result of the defendant's careless and negligent conduct. The facts relied on to establish the defendant's negligence must be stated with reasonable certainty. It is not sufficient to aver negligence generally, but the declaration must aver the act of negligence, and show that it is the efficient and proximate cause of the injury complained of.
3. **APPEAL AND ERROR—Defective Counts in Declaration—General Verdict—Reversal—Leave to Amend**.—If a declaration contains several counts based on different causes of action, some of which are bad, a general verdict for the plaintiff will be set aside by this court, as it cannot be told whether it was founded on the good counts or the bad, and the judgment of the trial court thereon will be reversed and the case remanded to the trial court with liberty to the plaintiff, if so advised, to amend the defective counts.

Error to a judgment of the Circuit Court of the city of Newport News in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

*Reversed.*

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Opinion.

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The opinion states the case.

*R. G. Bickford* and *S. O. Bland*, for the plaintiff in error.

*Ashby & Read* and *Christian & Mitchell*, for the defendant in error.

HARRISON, J., delivered the opinion of the court.

This action of trespass on the case was brought by A. L. Melton to recover of the Chesapeake and Ohio Railway Company damages for injuries alleged to have been caused by its negligence.

The case involves two separate and distinct alleged causes of action, one of which arose in August, 1907, and the other in January, 1908. There was a demurrer to the declaration and to each of its three counts, which was overruled. Upon the trial there was a demurrer to the evidence, and the jury brought in a general verdict, assessing the plaintiff's damages at \$777.50. Thereupon the court overruled the demurrer to the evidence, and gave judgment in favor of the plaintiff for the sum ascertained by the verdict of the jury. To that judgment this writ of error was awarded.

The first assignment of error is to the action of the circuit court in overruling the demurrer to the declaration and to each count thereof.

The first count of the declaration sets forth the first alleged trespass, and avers, in substance, that the defendant company owned and operated at Newport News a railroad yard, made up of many tracks, over which its trains, cars and engines were propelled for the purpose of disconnecting and making up its trains, and doing all those things usual in railroad yards, the said yard terminating on James river, where the defendant owned and operated its certain docks and piers; that the plaintiff was in the employment of the defendant company as section



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foreman, and at the time of the alleged grievance was engaged in repairing a switch on the said yard; that while so engaged a yard engine of the defendant, operated and controlled by its employees, approached the switch going to Pier No. 4 of the defendant; that the plaintiff spiked and fixed the switch temporarily so that the engine could proceed on its route; that the employees of the defendant well knew that the switch was out of order, and that provision for the engine passing was of a temporary character, intended only to permit the engine to pass down the track to Pier No. 4, and that it should not pass back over the switch until directed to do so by the plaintiff; that it thereupon became and was the duty of the defendant to use due and proper care to provide the plaintiff with a safe place to work, and to exercise like care not to injure him, and especially was it the defendant's duty to exercise due and proper care not to run its engines and trains upon him; that the employees of the defendant, knowing that the switch was out of order and being repaired by the plaintiff, returned from Pier No. 4 with the engine in front and several cars attached, and without considering the defendant's duty in the premises, but expressly, negligently, wrongfully and wilfully failing and refusing to perform the same, carelessly and negligently failed to keep any proper watch or look ahead, and without ringing the engine bell, blowing its whistle or giving the plaintiff the slightest warning of its approach, though the employees in charge of the engine knew that the plaintiff was at work on the switch, wilfully, negligently, carelessly and wrongfully ran the engine into the switch and against the plaintiff while he was exercising due, lawful and proper care, thereby inflicting the injury complained of.

We are of opinion that this count of the declaration states sufficient facts to enable the court to say, upon demurrer, whether, if the facts stated were proved, the plaintiff would be entitled to recover, and therefore the demurrer thereto was properly overruled. *Hortenstein v. Virginia-Carolina Ry. Co.*, 102 Va. 914, 47 S. E. 996.

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The second and third counts of the declaration set forth the second alleged cause of action, which arose in January, 1908. Each of these counts states that the accident complained of was on the yard of the defendant company at Newport News, and repeats the description of the yard given in the first count, and avers that the plaintiff was a section foreman in the employment of the defendant, and at the time of the alleged grievance was engaged in transferring his tools and men from one portion of the yard to another to do certain repair work, and that a collision occurred between a handcar, under the control and management of the plaintiff and an engine of the defendant. These counts of the declaration agree, except that in the third count the allegation is contained that the accident occurred while the plaintiff was endeavoring to remove the handcar from the railroad track in order to prevent the same from being run into and destroyed, while in the second count the allegation is that, as the plaintiff was on his journey on said handcar, a certain railway engine of the defendant, operated and controlled by its employees, was run into, upon and against the said handcar, causing the injuries complained of. The allegations of negligence in both counts are very general—in the second count that the railway engine of the defendant was wilfully, carelessly, negligently and wrongfully run into, upon and against the said handcar; and in the third count that those in control of and operating such engine in disregard of their duty to exercise reasonable and proper care not to injure the plaintiff, who was exercising due and reasonable care, had negligently, carelessly, wrongfully and wilfully run the said engine into, upon and against the said handcar, thereby causing the injuries complained of.

The degree of particularity required in stating the necessary facts to sustain an allegation of negligence has been repeatedly discussed in a number of very recent decisions of this court. *Hortenstein v. Virginia-Carolina Ry. Co.*, *supra*; *Lynchburg Traction Co. v. Guill*, 107 Va. 94, 57 S. E. 664; *Clinchfield Coal Co. v. Wheeler's Admr.*, 108 Va. 448, 62 S. E. 269; *N. N.*

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*& O. P. Ry. & Elec. Co. v. Nicolopoulos*, 109 Va. 165, 63 S. E. 443; *C. & O. Ry. Co. v. Hunter*, 109 Va. 341, 64 S. E. 44.

In the case last cited it is said: "The cardinal vice in all these counts is that, while they iterate and reiterate in varying phrase the charge of negligence against the defendant, they wholly omit to state the facts upon which the alleged negligence is predicated. It is well settled that it is not sufficient for the declaration to allege negligence in a general way, for to do so is only to state the pleader's conclusions of law from undisclosed facts; but it must aver the act of negligence relied on with reasonable certainty, and show that such act constitutes the efficient and proximate cause of the injury. Otherwise, no traversable issue is tendered, and the court cannot determine, as a matter of law, whether the declaration states a case of actionable negligence, and the defendant is not advised of the case he is called upon to defend. Our reports contain numerous illustrations of this principle."

In the case of *Lynchburg Traction Co. v. Guill*, *supra*, the court, speaking through the president, says: "Negligence is a conclusion of law from facts sufficiently pleaded. The office of a declaration is to inform the defendant of the case which it has to meet, so that it may have a reasonable opportunity to prepare its defense. It is not enough to say that the plaintiff was injured, and that the injury resulted from the careless and negligent conduct of the defendant, but the facts relied upon to establish the negligence for which the defendant is to be held liable must be stated with reasonable certainty."

In the case of *Newport News & O. P. Ry. & Elec. Co. v. Nicolopoulos*, *supra*, it is said: "The third count does not aver in what particular the defendant failed to perform its duty. It charges generally that the defendant negligently ran its car into the plaintiff's wagon whilst he was attempting to cross its track. As a count in trespass on the case this count is not good under our decisions."

Measured by these well-established principles, the second and

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third counts of the declaration in the case at bar are not good. They do not aver any fact relied upon to establish the negligence for which the defendant is to be held liable. Each of said counts amounts to no more than an allegation that a collision occurred on the railroad yards between a handcar under the control of the plaintiff and an engine under the control of other employees of the defendant, and that the engine of the defendant was wilfully, carelessly, negligently and wrongfully run into, upon and against the handcar. There is no allegation which shows any wilful wrong, nor is any omission of duty alleged which would make the conduct of those in charge of the engine either wilful, wrongful or negligent.

In the very recent case of *Wright v. Atlantic Coast Line R. Co.*, ante, p. 670, this court said: "It is not sufficient to charge that the plaintiff was wilfully and wantonly injured. If that naked allegation were sufficient the plaintiff could, in every case, be easily relieved from the consequences of his own imprudence. Negligence is a conclusion of law from facts sufficiently pleaded. The facts relied on to establish the wilful and wanton negligence, for which the defendant is to be held liable, must be stated with reasonable certainty."

We repeat here what was said in *Hunter's Case*, supra: "This court has not laid down, nor does it propose to establish any unreasonable rules with regard to particularity of averment in declarations in personal injury cases. All that the rule requires is that the declaration shall contain a concise statement of the material facts on which a recovery is demanded. Of course, the evidence relied on to sustain the averments of the declaration need not be pleaded. Surely a rule so essential for the enlightenment of the court and the defendant imposes no unreasonable burden upon the plaintiff. Indeed, it is hard to conceive how any intelligent system of pleading could require less."

The verdict of the jury being general, the court cannot say whether it rests upon the case stated in the first count of the declaration or upon that alleged in the second and third counts,

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which are bad. In this situation the judgment complained of must be reversed, for the error of the court in not sustaining the demurrer to the second and third counts of the declaration, the verdict of the jury set aside, and the case remanded to the circuit court for a new trial, with leave to the plaintiff, if he be so advised, to amend the second and third counts of his declaration.

*Reversed.*

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Syllabus.

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**Richmond.****CARTER v. JEFFRIES.**

March 10, 1910.

Absent, Buchanan and Whittle, JJ.

1. **SPECIFIC PERFORMANCE—*Parol Agreement to Sell Land—Case in Judgment.***—In a suit for the specific performance of a parol agreement for the sale of land it must appear that the parol agreement relied on is certain and definite in its terms; that the acts proved in part performance refer to, result from, or were made in pursuance of the agreement proved; and that the agreement has been so far executed that the refusal of full execution will operate as a fraud upon the party, and place him in a situation which does not lie in compensation. In the case in judgment, if it be conceded that the vendor became engaged to and intended to marry the appellee (if he had lived), and that he promised to convey to her the real estate in controversy, still the evidence does not show that the acts of part performance were such as are required, nor that the agreement was so far executed that a refusal of full execution would operate as a fraud upon the appellee, and place her in a situation which does not lie in compensation.
2. **ISSUE OUT OF CHANCERY—*Discretion of Chancellor—Appeal—Case in Judgment.***—An issue out of chancery awarded merely to satisfy the conscience of the chancellor is advisory only, and if he is not satisfied with the verdict he may set it aside and award a new trial of the issue, or he may disregard it and proceed to decide the cause without the intervention of another jury. The discretion of the chancellor in awarding an issue, and likewise in approving or disapproving the verdict thereon of the jury, must be exercised upon sound principles of reason and justice, and is subject to review on appeal. In the case in judgment the written evidence is wholly inconsistent with the conclusion reached by the jury, and hence it was error in the trial court to have approved their verdict.

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Appeal from a decree of the Circuit Court of Prince William county. Decree for the complainant. Defendant appeals.

*Reversed.*

The opinion states the case.

*Thos. H. Lion and John M. Johnson, for the appellant.*

*Walton Moore, Douglas S. Mackall, Jno. C. Gittings and Justin M. Chamberlain, for the appellee.*

KEITH, P., delivered the opinion of the court.

The appellee, Miss Jeffries, filed a bill in the Circuit Court of Prince William county, in which she states that Thomas T. Carter died on or about the 4th of February, 1906, unmarried and intestate; that he was the apparent owner in fee simple of real property in Prince William county, Va., known as "Idylwild"; that during the summer of 1903 she became acquainted with the decedent, Carter, at which time she resided with her father at their home in Fauquier county; that Carter commenced to pay her attention, which resulted in a proposal of marriage, which she declined, and stated to the decedent as her reason for so doing that her father was getting old and required attention, and it was her duty to care for him and make his home pleasant; that she taught school during the winter and took boarders during the summer as a means of support; that her refusal of Carter in no way affected their friendship, but that he continued to visit her from time to time; that in September, 1903, appellee's health became impaired, and Carter, being aware of that fact, again insisted that she should give up her endeavor to earn a living and marry him, and on the 9th of December wrote to her as follows: "Such generosity and sacrifice calls for a reward, and I admire it, and it should challenge the admiration of your friends and the public. Now I feel like

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offering something more substantial than sympathy and admiration. I mean offering to share the burden and help you to pay the rent, if you will let me, if your cousin J. will not. Of course you would feel a delicacy in accepting such an offer as Miss Lilly Jeffries, but as Mrs. C. you would not, so that I think you and I can solve the problem if the busybodies will keep quiet; and so I will now ask if you know of any reason, including the questions of health, age, likes and dislikes, honor and ability to provide, that would interfere with a promise to marry in the near future. I pause now for a reply." That in January, 1904, Carter became more insistent than ever, and added as an additional reason that he was extremely lonely, very desirous of her society, and was concerned in her welfare, renewing his request that she become engaged to him and in this way give him the right to provide for her and her father, and in order to induce her to accept, promised and agreed that if she could find a place that in her opinion would make a suitable home for herself and her father and himself and remove thereto, and would give up her school and other endeavors, and would keep house for them and undertake the care and management of such place, so that he might have the benefit of her companionship and society, and consent to become engaged to marry him in the future, that then and in that event, and in consideration thereof, he would purchase the place for her sole use and benefit and make it over to her. The bill then states that in consequence of such inducement, promise and agreement appellee found such a place as seemed to her suitable for the purposes, being the property of one Miss Louisa Moxley; that she agreed with Miss Moxley about the price and notified the decedent, and thereafter went with the decedent to see Miss Moxley and examined the place, at which time he told Miss Moxley that he desired to purchase the property for appellee. In consequence of this conversation Miss Moxley agreed to meet the decedent in a few days at her lawyer's in Manassas, when and where the purchase of the property was consummated, Carter taking title thereto in his own name;



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that afterwards the appellee, in performance of her aforesaid agreement, gave up her school and her other endeavors and moved upon the property, and was placed by the decedent in possession, and did undertake the care and management of the housekeeping and all the duties devolving upon her by virtue of the terms of the aforesaid agreement, and continuously thereafter performed the same, and did assent to become the wife of the decedent in the near future, the date of marriage being from time to time put off until it was finally decided that it should take place in the early spring of 1906; that they were engaged up to the time of the death of Mr. Carter, and from the time of taking possession of said property appellee gave to the decedent her constant care, society and attention, and fully performed the terms of the agreement on her part; that after the terms of the purchase had been arranged and the first deposit had been made it was suggested by Carter that the name of the place be changed from "Idylwild" to "Moxley," in view of the fact that the property had been built by Miss Moxley and maintained as a young ladies' seminary for twenty years, and Miss Moxley was asked by Carter if she had any objection to this being done, at the same time stating that appellee would have to acquiesce as the place was hers; that Miss Moxley having no objection, Carter wrote appellee the following letter on October 3, 1904: "I told Miss M. that I would like to rename the house 'Moxley.' What do you think of it? It will be yours. I enclose you my . . . of contract, which you can return, so keep it until I see you." That prior to her taking possession of the land Carter suggested that if she would sell her household furniture, which she had at her home in Fauquier, as the same was too heavy to move, he would remove all the furniture that he had in his home at Manassas to "Idylwild" and give it to her, and that Carter removed all his furniture to "Idylwild" and purchased other articles of furniture, giving all to her in compliance with his promise, all of which was then placed and still remains in her possession; that desiring to earn sufficient money with which to purchase her

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trousseau, appellee stated to Carter that she desired to take several boarders, to which he offered no objection, and in consequence thereof she did take several boarders, among whom was Mr. William Cogan, of Washington, D. C., who became very much attached to the place and desired to purchase it, offering to appellee \$2,400 therefor; that Carter suggested that she accept this offer and use the money in the purchase of another place in Prince William county owned by Mr. Washington; that Mr. Cogan was quite insistent that they accept his offer, but appellee never determined to do so, and a discussion having arisen between her and Carter in reference to this matter, on Christmas Day, 1905, Carter stated that he would leave it entirely to her to decide, and in further evidence, as he stated, of the fact that the property belonged to her, he executed and delivered to her in the presence of her father a paper writing made upon a check of the National Bank of Manassas, which is as follows:

**"No. Manassas, Va., December 25, 1905.**

**"THE NATIONAL BANK OF MANASSAS.**

“Pay to the order of—Miss Mary Lilly Jeffries \$2,500.00  
 —Idylwild—dollars.

(Signed)

**"THOS. T. CARTER."**

That, notwithstanding these assurances and promises, Carter failed to make and deliver a deed to her, or otherwise confirm her title; that early in February, 1906, he became ill and died on the 4th of that month without making any will or in any way confirming her title to the said property; and therefore she prays that the court may direct the defendant to execute and deliver to her a good and sufficient deed, conveying to her the property described in the bill in fee simple and for other and general relief.

William Carter, the defendant, demurred to and answered this bill. The answer denies each and every ground of equity set up in the bill; that any contract was ever made by Thomas T. Carter by which he purchased the property for the benefit of

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complainant or undertook to make her a deed for the same, or that the acts of part performance upon which she relies were made in pursuance of any such agreement. The answer charges that on the 1st day of December, 1904, Thomas T. Carter made a lease of the land in question to Miss Jeffries and her father, George W. Jeffries, by which "Idylwild" was rented to them from December 1, 1904, to December 1, 1905, with the privilege of three years—that is to say, until December 1, 1907—and that it was in pursuance of this lease, which is copied into the bill in full, that Miss Jeffries and her father moved to and took possession of the premises in controversy. This lease is in writing, under seal, and is signed by Thomas T. Carter, Miss Jeffries and her father. The answer denies that Miss Jeffries was persuaded by decedent to give up her school in Fauquier county, but avers that she gave it up at that particular location, because the premises she then occupied had been sold, and the owner required immediate possession, and that it was at her earnest solicitation that "Idylwild" was purchased and leased to her, and that decedent made his home with her and her father out of consideration of the friendly feeling he had for complainant and the sympathy which she aroused in him; that while she was in the occupany of "Idylwild" she continued to teach and to receive boarders in order to provide for her own maintenance as she had theretofore done. The answer states that appellee was no more solicitous in regard to Mr. Carter's well-being than she was of other boarders at her house.

During the progress of the case in the circuit court issues out of chancery were awarded as follows:

1. Did Thomas T. Carter, deceased, during his lifetime, and Lilly Jeffries, the complainant, enter into a contract to marry in the near future, and did the said Thomas T. Carter purchase the farm mentioned and described in these proceedings for the complainant in consideration of said contract to marry in the near future and place the complainant in possession of the same, as owner thereof, and in order to take possession of said farm and

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fulfil said contract to marry in the near future on her part did the said complainant give up her position as teacher and change her situation in life.

2. Did the said complainant and her father, George W. Jeffries, enter into a contract with the said Thos. T. Carter for the lease of said farm and occupy the same as his tenants?

3. Did the said complainant ever make a claim of ownership of the said farm during the lifetime of the said Thos. T. Carter?

Upon the first and third of these issues the jury found in the affirmative, and upon the second in the negative. There was a motion to set aside the verdict, which the court overruled, and entered the decree, granting the relief prayed for in the bill; and the case is before us for review upon an appeal taken from that decree.

In *Wright v. Puckett*, 22 Gratt. 370, it is said that in a suit for the specific performance of a parol agreement for the sale of land it must appear that the parol agreement relied on is certain and definite in its terms; that the acts proved in part performance must refer to, result from, or be made in pursuance of the agreement proved; and that the agreement must have been so far executed that a refusal of full execution would operate a fraud upon the party and place him in a situation which does not lie in compensation. This case has been frequently cited and approved. See *Henley v. Cottrell Real Estate Co.*, 101 Va. 70, 43 S. E. 191; *Venable, &c., v. Stamper*, 102 Va. 30, 45 S. E. 738.

It may be conceded that Thomas T. Carter became engaged to and intended to marry the appellee. It may be further conceded that he promised to convey to her the real estate in controversy; but the evidence fails to show that the acts proved in part performance referred to, resulted from, or were made in pursuance of the agreement proved, or that the agreement was so far executed that a refusal of full execution would operate as a fraud upon the appellee and place her in a situation which does not lie in compensation.

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It is true that the jury have found certain issues, which they were sworn to try, in favor of appellee. They have found that Thomas T. Carter, during his lifetime, and Miss Jeffries, the complainant, did enter into a contract to marry, and that Carter did purchase the farm in consideration of the contract to marry, and did place the complainant in possession of the same as owner thereof; and that, in order to take possession of said farm and fulfil said contract to marry, she did give up her position as teacher and change her situation in life. The jury found that said complainant did make claim of ownership of said farm during the lifetime of said Thos. T. Carter, and that the complainant and her father did not enter into a contract with Thos. T. Carter for the lease of said farm and occupy the same as his tenants. But the verdict of the jury in the case before us, where an issue out of chancery was awarded merely to satisfy the conscience of the chancellor, is advisory only, and if not satisfactory to the court may be wholly disregarded. *Lambert v. Cooper*, 29 Gratt. 61.

As was said by this court in *Miller v. Wills*, 95 Va. 337, 28 S. E. 337: "A court of equity has the right, in a proper case, to order one or more issues to be tried by a jury, either in a court of common law or at its own bar. The issue, except where it is directed by statute, is a mere incident to the suit in chancery. It is directed merely to satisfy the conscience of the chancellor, and if he is not satisfied with the verdict he may set it aside and award a new trial of the issue, or he may disregard it and proceed to decide the cause without the intervention of another jury. . . . While directing an issue to be tried by a jury is a matter of discretion in a court of equity, it is not, however, a mere arbitrary discretion, but such discretion must be exercised upon sound principles of reason and justice. A mistake in its exercise is a just ground of appeal, and the appellate court will judge whether such discretion has been soundly exercised in a given case. . . . And likewise is the action of a court of equity, in approving the verdict of a jury upon an issue and de-

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creeing in accordance with it, or in disregarding it and decreeing against it, equally the subject of review by the appellate tribunal."

In our judgment the written evidence in this case is wholly inconsistent with the conclusion reached by the jury. As we have seen, Carter made a lease of this property to Miss Jeffries and her father by a written instrument under seal and of date December 1, 1904. That they entered and took possession of the property under that lease does not, we think, admit of doubt.

A Mr. Cogan, as we have seen, was desirous of purchasing the farm in controversy, and, as appears from his evidence, entered into negotiations with Mr. Carter upon the subject. He says in his testimony that during the negotiations, which were wholly with Mr. Carter, he saw and talked with him in the presence of Miss Jeffries, and that she never at any time made any claim that the property was hers, except that she stated she had a lease upon it.

On January 28, 1906, she wrote to Mr. Cogan upon the subject as follows:

"Dear Mr. Cogan,—Mr. Carter thinks it best for me to advise you that it may be impossible for us to vacate here in April and perhaps not until fall, as up to this date we have not been able to find a suitable place, either for sale or rent. Mr. Carter and papa have both been on the hunt. I hope this delay, if it must be, will not interfere with the sale of place. I will do my best to find some other place before April, for I do not, as I have said, wish to interfere with the sale of place. If we have ice will fill icehouse as usual, and if I succeed in finding another place will advise you at once. You should not think hard of me for this, as you and Mr. Carter should have come to terms last fall; then I could have rented places that were for rent first of year. At this time it is almost impossible to rent, and Mr. Carter does not want to purchase a place for us that does not suit him. With love to all,

"Very sincerely,

"LILLY JEFFRIES."

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"I would be glad to have you and Miss Hanna come up any Saturday or Sun., but the rest of the week I am kept very busy with my school."

On January 31, 1906, she wrote Mr. Cogan as follows:

"Dear Sir,—Finding that my father and I cannot rent any suitable place, and not being in a position to buy, we are compelled to remain here under the lease, which is good until December, 1907. When I wrote you I would not interfere with sale of place it was with a view that Mr. Carter would buy elsewhere and rent to us, as he intended about any place, I feel that I am released from my promise. I do not think our refusing to give up this place will be any loss to you, as you have stated Virginia was full of desirable places for sale; many, no doubt, that would suit you better than this; even if I had a place in view it would inconvenience me a thousand times more to move than it would you not to come. Some of my friends have estimated the loss of my moving in spring at \$300.00, plus the work and inconvenience. I am at a loss to know how you have lost so much money preparing for the change and all within a period of one week. I am sure you can find a place in a very short time.

"Very truly,

"LILLY JEFFRIES."

"January 31, 1906.

On another piece of paper and enclosed in the same letter there is the following: "Papa wishes me to say that one day shortly after you had written Mr. Ca. not long ago he and Mr. C. were talking of selling and moving, and Mr. C. asked him what he thought of the matter, and papa remarked that he hoped when he came here he would not have to move again, and Mr. C. said, well, that settles it; we will remain here the rest of our days. Of course, papa had in his power to refuse to leave, as he was one of the signers of the lease, and had not been consulted; but he, like I, would have gone to another place with Mr. C. if

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he had wished it; we, as the Ellises and many others, know he had fully decided to remain here, and every one thinks he had a right to do so.

(Signed)

“L. J.”

Then comes an undated letter to Mr. Cogan:

“Dear Mr. Cogan,—I am glad Mr. Carter has reconsidered his offer. I wished him when he answered your letter not to consider me, as I would not stand in the way of sale of place. True no one could need a hundred dollars more than I, but I am willing to trust to luck. I will also give up my lease which is signed by me for 1906; by doing this you see I am not standing in way of sale, and think you will regret, if you do not buy now, as this is a beautiful home, and have no place in view now, but am very anxious for Mr. C. to sell. Miss Agnes was very unkind to say I was the cause of Mr. C. not selling, and hope you all do not think the same. With best love to all,

“Sincerely,

“LILLY JEFFRIES.”

Mr. Carter died on February 4, 1906, and on February 12 of that year Miss Jeffries wrote again to Mr. Cogan:

“I have intended to write you ever since the death of Mr. Carter, as it was his request that I should write to you explaining about the lease and enclose it with his letter, which he intended to write the morning after his death. It worried him to think you doubted his word in regard to our signing lease; he put his name on lease in December, and put it on mantel for papa and I to sign. This I did on 30th of December, and my father being away on a visit to Ethel's, signed it on his return about 5th of January. Mr. C. was not aware of the fact that papa's name was on lease when he wrote, but was glad to know it was, as he did not want to sell Idylwilde, when you offered him \$2,400.00, for the reason he would not find another place to suit him, and he did not want the trouble of moving, and when



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he wrote you last had fully made up his mind to remain here the rest of his life, and made this remark in presence of several, the Saturday before he died; the last letter I wrote you was written by his dictation in the presence of papa. I did not influence, and if he could have found a place to suit him better I would have gone with him, and given up my lease, but he did not wish to leave here after due consideration; my lease is good until Dec. 1, 1907, if properly signed, and among his private papers, which are in the hands of one of his friends; I also have a copy. Mr. C's. affairs have never been settled and everything is here just as he left it, except his private papers, which were given over to his relations the morning after his death. I am expecting his attorney any day, who is also a friend of mine, I having met him through Mr. Carter. This death was indeed a great shock to us all, and I feel I have lost my best friend; he seemed perfectly well the night before he died and he and papa were singing some old hymns. On the Saturday before he and I walked over to Mr. Cockrell's, and he seemed to enjoy the trip very much; the place does not seem the same without him, as he was always home, and as he said, looking after things while I was teaching school; he is missed by all that know him; how much papa and I miss him we can never express. Papa and Mr. Oscar Ellis, who were the first to see him, think he died without a struggle.

“Very truly,

“LILLY JEFFRIES.”

“I trust none of you will bear Mr. C. any ill will, as he was doing what he thought best for papa and I, and I was acting to please him, which I shall continue to do as far as I can.”

On February 18, 1906, she again wrote to Mr. Cogan as follows:

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“Dear Mr. Cogan:

“I do not understand what you mean when you say in yours of 15th inst—‘I will show the public that I have no fear of being haunted by Mr. Carter’s death, as suggested by you in an unsigned communication in your handwritting.’ I have never at any time written you without signing my name, or have I ever thought of you as connected with Mr. C.’s death, therefore I do not know what you mean by accusing me of writing the above. I have only written you the one since Mr. C.’s death, and that on the 12th in regard to the lease, which was signed correctly, and by Mr. Carter’s request; it has been read by two of our best lawyers and they both say it is all right. One of them wrote lease for Mr. C. and knows all about the signing and his deciding not to sell, as he saw him the Friday before he died. I did not influence Mr. C. to remain here against his will, and can prove all I say. I shall certainly expect you to explain what you mean by accusing me of sending you an unsigned letter. I only wish Mr. Carter could have lived to have written you, then you would not have said I was the cause of this trouble; he would have written you the truth in regard to the whole matter. I am sorry you all think so hard of me, but would rather the blame would rest on me than on one who is gone and cannot defend himself.

“Very truly,

“LILLY JEFFRIES.”

Without undertaking further to discuss the evidence we are of opinion, the verdict of the jury to the contrary notwithstanding, that Miss Jeffries and her father did enter into a contract with Mr. Carter for the lease of his farm, and did occupy the same as his tenants. Her own letters show, moreover, that she did not give up her occupation as a teacher, but that she continued to pursue that avocation as a means of support after she had entered upon the leased premises; and, upon the whole

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**Opinion.**

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case, we are of opinion that the evidence does not show that the acts relied upon as a part performance of the agreement which she asks to be specifically enforced were done or made in pursuance of that agreement; that the evidence does not show that the agreement set up in her bill has been so far executed that a refusal of full execution would operate as a fraud upon the appellee and place her in a situation which does not lie in compensation.

For these reasons we are of opinion that the decree of the circuit court is erroneous, and must be reversed.

*Reversed.*

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Statement.

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**Richmond.**

## EUBANK v. CITY OF RICHMOND.

March 10, 1910.

Absent, Buchanan, J.

1. CONSTITUTIONAL LAW—*Police Power—Authorizing Establishment of Building Lines.*—An act of Assembly authorizing the councils of cities and towns to establish building lines on streets to which all property owners must conform is within the police power of the legislature, and is constitutional, if not unreasonable. Such legislation is in the interest of the health, safety, comfort and convenience of the public.
2. MUNICIPAL CORPORATIONS—*Delegation of Powers to Committee—Building Lines—Case at Bar.*—A city ordinance providing "That whenever the owners of two-thirds of the property abutting on any street shall, in writing, request the committee on streets to establish a building line on the side of the square on which their property fronts, the said committee shall establish such line so that the same shall not be less than five nor more than thirty feet from the street line," leaving to the determination of the committee only, within the prescribed limits, how far the building line shall be from the line of the street, is not a delegation to the committee on streets of the functions of the city council to establish building lines. The committee is clothed with no discretion as to whether a building line shall or shall not be established in a given case.

Error to a judgment of the Hustings Court of the city of Richmond, affirming a judgment of the police justice imposing a fine on the plaintiff in error.

*Affirmed.*

The opinion states the case.

*S. S. P. Patteson*, for the plaintiff in error.

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Opinion.

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*H. R. Pollard and Geo. Wayne Anderson*, for the defendant in error.

WHITTLE, J., delivered the opinion of the court.

This writ of error is to a judgment of the Hustings Court of the city of Richmond, affirming a judgment of the police justice of the city imposing a fine upon the plaintiff in error for the violation of the "building line" ordinance.

By act of the General Assembly of Virginia, passed March 14, 1908, councils of cities and towns are authorized, among other things, "to make regulations concerning the building of houses in the city or town, and in their discretion . . . in particular districts or along particular streets, to prescribe and establish building lines, or to require property owners in certain localities or districts to leave a certain percentage of lots free from buildings, and to regulate the height of buildings," etc. Acts 1908, p. 623-4.

By virtue of this act, the city council passed an ordinance "That whenever the owners of two-thirds of the property abutting on any street shall, in writing, request the committee on streets to establish a building line on the side of the square on which their property fronts, the said committee shall establish such line so that the same shall not be less than five feet nor more than thirty feet from the street line, . . . and no permit for the erection of any building upon such front of the square upon which such building line is so established shall be issued except for the construction of houses within the limits of such line." The ordinance then prescribes a fine of not less than twenty-five nor more than five hundred dollars for its violation.

The controlling question presented by the record is whether or not the act of March 14, 1908, is constitutional. If that question be answered in the affirmative, it will be only neces-

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sary for us to inquire whether or not the power granted has been lawfully exercised.

It is well understood and settled by decisions of the highest authority that the legislature may, in the exercise of the police power, place limitations upon personal rights and the rights of property, in the interest of public health, public morals and public safety.

This principle was distinctly announced in the case of *Welch v. Swasey*, 193 Mass. 364, 79 N. E. 745, 118 Am. St. Rep. 523, involving the validity of building regulations made by authority of legislative enactment, with respect to the height of buildings and their mode of construction in cities. The application for a *mandamus* by the plaintiff in error was addressed to the justices of the supreme judicial court of the State of Massachusetts to compel the defendants in error, who constituted a board of appeal from the building commissioner of the city of Boston, to issue a permit to him to build on his lot in that city. The ground of refusal to grant the building permit was because the site for the proposed building was in a district in which the height of buildings was limited to from eighty to one hundred feet, and the height of the proposed building was in excess of the prescribed limit. The case was referred to the full court, which held the statute and the action of the commission thereunder constitutional. Upon writ of error to the Supreme Court of the United States the judgment was unanimously affirmed. *Welch v. Swasey*, 214 U. S. 91, 53 L. Ed. 923, 29 Sup. Ct. 567.

In that case both the Supreme Court of Massachusetts and the Supreme Court of the United States decided that the regulation in question was plainly passed by the legislature in furtherance of "the safety, comfort, or convenience of the people," and, therefore, should be upheld as a valid exercise of police power. It was moreover held (the facts being sufficient to justify the enactment) that the circumstance that considerations of an esthetic nature may also have entered into the reasons which influenced the legislature could not invalidate the act.

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So, in the present case, the statute is neither unreasonable nor unusual, and we are justified in concluding that it was passed by the legislature in good faith, and in the interest of the health, safety, comfort, or convenience of the public, and for the benefit of the property owners generally who are affected by its provisions; and that the enactment tends to accomplish all, or at least some, of these objects. The validity of such legislation is generally recognized and upheld. Freund on Police Power, secs. 118, 128; Smith's Modern Law Mun. Corps., sec. 1322; *U. S. ex rel Strasberger v. Commissioners*, 5 Mackey (D. C.) 389, 391; *Attorney General v. Williams*, 174 Mass. 477, 55 N. E. 77; *Com'th v. Strauss*, 191 Mass. 545, 78 N. E. 136; *Com'th v. Cotton*, 8 Gray (Mass.), 488; *Berger v. Henley*, 73 Conn. 536, 48 Atl. 215; *People v. D'Oench*, 111 N. Y. 361, 18 N. E. 862; *Barbier v. Connolly*, 113 U. S. 27, 28 L. Ed. 923, 5 Sup. Ct. 357; *C. B. & Q. Ry. Co. v. Drainage Com'rs*, 200 U. S. 561, 592, 50 L. Ed. 596, 26 Sup. Ct. 341; *Bacon v. Walker*, 204 U. S. 311, 317, 51 L. Ed. 499, 27 Sup. Ct. 289.

For these reasons we are of opinion that the statute is not amenable to objection on constitutional grounds.

The remaining inquiry is whether or not the power granted by the legislature has been lawfully exercised by the city council. The contention under this assignment of error is founded upon the assumption that the city council has delegated functions arising out of its police power to the committee on streets.

An inspection of the ordinance will show that this assignment is not well taken. The committee is clothed with no discretion as to whether a street line shall or shall not be established in a given case. The language of the ordinance is mandatory, "that wherever the owners of two-thirds of the property abutting on any street shall, in writing, request the committee on streets to establish a building line on the side of the square on which their property fronts, the said committee shall establish such line."

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All that is left to the discretion of the committee in the discharge of an administrative function is to determine, within prescribed limits, how far the building line shall be from the line of the street.

In the case of *Welch v. Swasey, supra*, the Supreme Court of Massachusetts said: "The delegation to a commission of the determination of the boundaries of these parts for the classes was within the constitutional power of the general court. The work of the commissioners under the first act was not legislation, but the ascertainment of facts and the application of the statute to them for purposes of administration. Such subsidiary work by a commission is justified in many cases.

In the case of *Ould & Carrington v. City of Richmond*, 23 Gratt. 471, 14 Am. Rep. 139, for purposes of taxation, the city council divided lawyers into six classes, and devolved upon the finance committee the duty of assigning them to their appropriate class. It was contended that this was an illegal delegation of power, but this court held otherwise and sustained the tax ordinance. See also, *Hitchcock v. Galveston*, 96 U. S. 348, 24 L. Ed. 659; *Union Bridge Co. v. U. S.*, 204 U. S. 378, 387, 51 L. Ed. 523, 27 Sup. Ct. 367; *St. Louis, etc., R. Co. v. Taylor*, 210 U. S. 287, 52 L. Ed. 1061, 28 Sup. Ct. 616.

There are other contentions of minor importance, but they are without merit and need not be discussed.

We find no error in the judgment of the hustings court, and it must be affirmed.

*Affirmed.*



Statement.

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**Richmond,**

GRING v. LAKE DRUMMOND CANAL AND WATER CO.

March 10, 1910.

Absent, Buchanan and Whittle, JJ.

1. OFFICE JUDGMENTS—*When Final—Quarterly Terms of Circuit Courts.*

An office judgment entered in the clerk's office of a circuit court becomes final on the adjournment of the next succeeding term of the court, or on the fifteenth day thereof, whichever first happens, unless previously set aside upon a plea in bar filed by the defendant. The fact that the judges of the circuit courts are authorized to designate four of the terms required by law to be held as quarterly terms, at which all civil cases for which juries may be required shall be tried, does not extend the time within which the defendant must have the office judgment against him set aside. The legislature has not changed the statute in this respect as to cases pending in circuit courts, though it has as to cases pending in corporation courts, and the courts cannot, by construction, read into the statutes words that the legislature has not placed there.

2. OFFICE JUDGMENTS—*Proceedings After Finality—Waiver.*—All proceedings in an action at law after an office judgment in favor of the plaintiff has become final are a nullity, or should be set aside so as to give the plaintiff the benefit of the final judgment in his favor. The fact that the plaintiff took issue on a plea filed after the office judgment became final, and also asked for a continuance, do not constitute a waiver of the final judgment in his favor.

Error to a judgment of the Circuit Court of Norfolk county in an action of *assumpsit*. Judgment for the defendant. Plaintiff assigns error.

*Reversed.*

The opinion states the case.

Opinion.

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*James E. Heath*, for the plaintiff in error.

*John W. Happer* and *Frank L. Crocker*, for the defendant in error.

CARDWELL, J., delivered the opinion of the court.

The plaintiff, Charles Gring, at the second rules held in the clerk's office of the Circuit Court of Norfolk county on the 3d Monday in December, 1906, brought his action of *assumpsit* against the defendant, the Lake Drummond Canal and Water Company, to recover certain tolls and charges, amounting to \$2,058.15, which it, as alleged, had illegally and against his protest during several years next preceding collected from the plaintiff.

The declaration contains the common counts in *assumpsit*, and to it an affidavit was appended, in accordance with section 3286 of the Code, and also an account setting forth the items of the plaintiff's claim. At the rules at which the declaration was filed the common order was duly entered thereon, and at the next rules, which were held on the first Monday in January, 1907, the common order was confirmed. A term of said court was held in January and another in February, 1907, but no pleas were filed in the case until the March term, 1907, which commenced on the 4th day of March, on which day the defendant filed a plea of the general issue, together with an affidavit, pursuant to section 3286 of the Code, to which plea the plaintiff replied generally, and an order was thereupon entered on the same day setting aside the judgment entered at rules with leave to the defendant to file special pleas in writing. On the 13th day of June, 1907, the plaintiff appeared by counsel in open court and moved that the plea of the defendant which had been filed on the 4th day of March, 1907, and a special plea of the statute of limitations be stricken out, and that the order entered setting aside the judgment entered at rules be set aside,

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and that judgment in favor of the plaintiff be then entered; which motion the court overruled, upon the ground that as the March, June, October and December terms of the Circuit Court of Norfolk county had been designated as civil terms for the trial of civil cases, the March term, 1907, was the next succeeding term after the office judgment in this cause had been entered; and, therefore, it was not required that said pleas should have been filed on or before the last day of the January, 1907, term of the court, or the fifteenth day thereof if the term lasted so long, and that it was not too late to file them after the expiration of said term; to which ruling the plaintiff excepted, and the exception was duly made a part of the record.

On the 23d day of October, 1907, the plaintiff filed a replication to the plea of the statute of limitations, and on his motion the cause was continued until the fifteenth day of June, 1908, at which time, neither party demanding a jury, the court, upon an agreed statement of facts, proceeded to hear and determine the whole matter of law and fact, with the result that on July 3, 1908, the judgment now under review was entered.

The first assignment of error is to the ruling of the circuit court setting aside the judgment in favor of plaintiff in error, which was entered at the rules held on the last Monday in December, 1906, and which, as is contended, became final on the fifteenth day of the January term, 1907, of said court, or at the expiration thereof, if that occurred before the fifteenth day of the term.

That plaintiff in error was entitled to an office judgment for the amount of his claim sued on at the second rules held in the clerk's office following the filing of his declaration accompanied by the affidavit, etc., required by section 3286 of the Code, to become final on the fifteenth day of the next term of the court or at the expiration thereof, if that occurred before the fifteenth day of the term, unless the defendant filed a plea in bar of the action accompanied by affidavit as required by the same statute,

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is the settled law in this State. *Price v. Marks*, 103 Va. 18, 48 S. E. 499, and authorities there cited.

Section 3059 of the Code, as amended by an act approved March 15, 1904 (Acts 1904, p. 335), authorizes the judges of the circuit courts to designate four of the terms required by law to be held, to be known as quarterly terms, at which all civil cases for which juries may be required shall be tried; and the contention of defendant in error is that, in view of the changes made in the circuit courts by and under the new Constitution, it is necessary to read section 3287 of the Code as if the word "quarterly" had been inserted therein between the words "next" and "term" in the fourth line of the statute; or that when this statute is construed in the light of other statutes *in pari materia*, it should be read as if the word "quarterly" appeared between the words "next" and "term" in the fourth line thereof; so that in this case, as the January and February terms, 1907, of the court were not *quarterly* terms, the March term following was the first term after the filing of the declaration at which the defendant in error could file a plea in bar of the action. In other words, that the words "next term" in section 3287 means the next term at which the case can be heard, at which the court has jurisdiction to determine the questions involved, which in this case was the March term, 1907.

While it would be entirely within the province of the legislature to amend the statute by inserting therein at the appropriate place the word *quarterly*, it is beyond the power of the courts to make the insertion. The legislature did, by an act approved March 14, 1908 (Acts 1908, p. 601), so amend section 3287, *supra*, as to provide that an office judgment entered at rules held in the clerk's office of a corporation court should only become final as of the last day of the next term designated for the trial of civil cases in which juries are required, or on the fifteenth day thereof, whichever shall happen first, but left the statute unchanged with respect to office judgments entered in the office of the clerks of the circuit courts and as to when they

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became final. May not the legislature well have thought that in the country the issues in a civil case requiring a jury should be promptly made up in advance of the term of the court at which the case could be tried, so that there would be no delay when that term arrived? At all events, there is nothing in the statute, as originally enacted, or as amended, which throws any light upon any intention of the legislature that the statute should have a meaning other than the plain language employed therein indicates that it should have, and where this is the case the courts cannot, by interpolation of words or construction, take from or add to the literal meaning of the statute, even though it may work inconvenience or there may have been an *omissus* in it. *Johnson v. Barham*, 99 Va. 305, 38 S. E. 136; Suth. on Stat. Constr., sec. 261. This view imposes no hardship on defendants in cases like this, for there is nothing therein, or in the statute, to prevent him from pleading at rules or within fifteen days after the beginning of the next term succeeding the rules at which an office judgment is entered against him, although the issues made by his plea or pleas could not be tried until the next term of the court designated for the trial of civil cases in which juries are required.

But, argues defendant in error, even though plaintiff in error's judgment might have become and remained final after the last day of the January term, 1907, of the court, or the fifteenth day of the term, whichever happened first, he has waived his right to claim the benefit of the judgment by replying to the plea of the general issue filed by the defendant in error at the March term, 1907, and by other conduct in the case thereafter.

In this view we do not at all concur. Plaintiff in error had either to reply to the plea of the defendant in error, allowed by the court to be filed at the March term, 1907, or allow it to become a part of the record in the case unchallenged, and even though he did ask a continuance of the case after the court had overruled his motion to strike out the pleas which the defend-

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ant in error had been improperly allowed to file, he cannot be held to have waived any of his rights to the benefit of the final judgment in his favor according to the plain provisions of the statute. Sec. 327 of the Code, *supra*.

"If the term of a circuit court lasts more than fifteen days, all office judgments in which no writ of inquiry is ordered become final judgments on the fifteenth day, and cannot be afterwards set aside by the court.

"When a court authorizes executions to issue upon judgments recovered during the term the judgments become final from the time when execution may issue, and cannot afterwards be set aside by the court.

"A court having set aside an office judgment and the execution which had issued upon it after the fifteenth day of the term, and permitted the defendant to plead, the plaintiff may have a *supersedeas* from this order; and though that part of the order setting aside the judgment is interlocutory, the appellate court will reverse the whole order." *Enders' Executors v. Burch*, 15 Gratt. 64.

"It is true that at common law executions issued only upon final judgments. It is also true at common law that 'during the term wherein any judicial act is done the record remains in the breast of the judges of the court and in their remembrance, and therefore the roll is alterable during that term as the judges shall direct; but when that term is past, then the record is in the roll, and admits of no alteration, averment or proof to the contrary.' 3 Tho. Co. Lit. 323, cited in *Enders v. Burch*, at p. 66." *Baker v. Swineford*, 97 Va. 115, 33 S. E. 543.

See also the following cases decided by the Supreme Court of West Virginia, construing the statute of that State similar to our statute. *State v. Corvin*, 51 W. Va. 19, 41 S. E. 211; *Merstiller v. Ward*, 52 W. Va. 74, 43 S. E. 178. See also *Bradley v. Long*, 57 W. Va. 599, 50 S. E. 746.

By analogy the case of *Battaile v. Maryland Hospital Co.*, 76 Va. 63, though a proceeding in equity, is, in its reasoning as

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well as conclusions reached, entirely applicable here. It was there held: "A decree that ends the cause is that no further action of the court in the cause is necessary." "All decrees, orders or proceedings in the cause, after the rendition of a final decree, are erroneous, and must be reversed. And so, all decrees, orders and proceedings before a final decree, however erroneous, must stand."

Upon the same reasoning all the proceedings in this case after the office judgment in favor of plaintiff in error became final on the last day of the January term, 1907, of the circuit court, or on the fifteenth day thereof, whichever happened first, were a nullity or should be set aside, so as to entitle him to the benefit of this final judgment in his favor against the defendant in error for the amount of his claim.

For these reasons the judgment of the circuit court will be reversed, and this court will enter the judgment that the circuit court should have entered in favor of plaintiff in error and against the defendant in error for the amount of his claim sued on, together with his costs in this court and in the circuit court.

*Reversed.*

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Statement.

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**Richmond.****LEWELLING'S ADMINISTRATOR AND OTHERS v. LEWELLING.**

March 10, 1910.

Absent, Buchanan, J.

1. **PARTNERSHIP—Accounting—Burden of Proof.**—In a suit to settle the affairs of a partnership the burden of proof is upon the managing partner, who kept the books of the firm.
2. **PARTNERSHIP—Accounting—Lack of Evidence—Speculative Results—Refusal of Equity to Take Jurisdiction.**—Where partners have kept no books or accounts of their partnership transactions, and any conclusion which a court of equity might reach in its efforts to settle the accounts between the partners would be purely speculative and conjectural, the court will withhold its hand and leave the parties to stand where they have placed themselves. Any other rule would open the door for fraud on the part of a surviving partner upon the estate of his deceased partner, and this is especially true where the surviving partner had practically exclusive control of the affairs and dealings of the partnership, and was solely responsible for the lack of any books or accounts showing the status of the accounts between the partners.

Appeal from a decree of the Circuit Court of Elizabeth City county. Decree for the complainant. Defendants appeal.

*Reversed.*

The opinion states the case.

*Sidney J. Dudley, S. Gordon Cumming, Jno. W. Friend and F. S. Collier, for the appellants.*

*Louis C. Phillips and R. M. Lett, for the appellee.*



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CARDWELL, J., delivered the opinion of the court.

James W. Lewelling and Thomas L. Lewelling were brothers and in their early manhood, about the year 1873, they entered upon some sort of a partnership or joint business undertaking. No books of account were then or afterwards opened showing their affairs *inter sese*, and none were intended or supposed to have been kept. Each of the brothers took from the assets held by them in common what he needed for his personal and family expenses or uses (both being married), and what remained was regarded by them as belonging to both in common. Each brother, however, owned real estate of his own which he had inherited or derived otherwise than from the joint business. The operations they engaged in were varied. In the early years thereof they were farming and conducting a sawmill; afterwards, a livery and feed business in Hampton, Va., which was not, as it seems, a success, and they returned to farming, saw-milling and grist-milling; their last venture being a livery stable and feed business in Newport News, commenced about 1904, and conducted until the fall of 1905. During the latter part of the life of this business both of the brothers became quite dissipated, the result being a neglect of their business, and its consequent failure. Finding that their business was no longer prosperous, and that disaster in the attempt to further prosecute it confronted them, the two brothers determined to dissolve the business relationship which had so long existed between them, and to this end they prepared and executed a deed partitioning certain real estate they owned as partners in Newport News, consisting of two adjoining lots, one of which was improved by the erection of a house thereon, so that this lot was worth \$1,000 more than the other. The improved lot was conveyed to James W. Lewelling, and the unimproved lot to Thos. L. Lewelling; and it is claimed on behalf of Thomas Lewelling in this litigation that it was then understood between the brothers that he

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(Thomas) was to have other property to the value of \$1,000, "to make good this difference."

In September of the same year, the two brothers had prepared and signed another deed partitioning equally between them what was known as the "Franklin Street property"; and later in the same month and year they went to an attorney's office, and, after going over the property which they owned jointly, piece by piece, had prepared a deed partitioning the same, making due allowance for the difference in values of the properties conveyed in the first deed, and agreed that Thomas Lewelling should have an extra lot on Chappel street, "to make good the difference." This deed was, however, not signed, because the wife of James Lewelling refused to relinquish her dower interest in the property sought to be partitioned.

In this condition of affairs, in the fall of 1905, creditors of the partnership brought actions and secured judgments against the firm, and shortly afterwards two chancery suits were instituted by these creditors to enforce the lien of their said judgments.

James Lewelling died, January 20, 1906, and afterwards, the said chancery suits were revived in the names of his widow and heirs, whereupon the two suits were consolidated, certain accounts taken and a number of decrees entered; so that a large part of the assets of the firm of Lewelling Brothers, both real and personal, was sold and the proceeds applied to the payment of some of the partnership debts.

After the dissolution of this partnership by the death of James Lewelling, and after the institution of the chancery suits mentioned, the Dabney Brokerage Co., which held a deed of trust on real estate belonging to Thomas Lewelling individually, to secure a debt of said firm, foreclosed its trust deed by a sale of the land it conveyed for \$1,580.00, and the purchase money therefore was applied in part payment of the debt secured by the trust deed. Thereupon the Dabney Brokerage Co. proved in the aforesaid chancery causes their debt against the partner-

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ship for the balance due thereon, and received said balance out of the funds in those causes.

In these chancery proceedings there was paid to the widow of James Lewelling \$575.98 for her dower interest in the lands sold therein, but as the wife of Thomas Lewelling was dead, no dower interest attached to his interest in the lands.

At this stage in the proceedings in said chancery causes Thomas Lewelling filed his separate bill, asking for a winding up of the partnership and a settlement of the partnership affairs between him and his deceased brother, which suit was consolidated with the said chancery causes then pending, and on February 1, 1907, the three causes were referred to a master commissioner for an account and report upon the matters in issue.

On January 21, 1908, the commissioner filed his report, in which he reported adversely to all the claims set up by Thomas Lewelling against the estate of his deceased brother and partner, except three: (1) With respect to the \$1,580 realized by the Dabney Brokerage Co. from the private property of Thomas Lewelling on the partnership debt of the Lewelling Brothers, after the death of James Lewelling, and the commissioner recommended that this debt be allowed in favor of Thomas Lewelling against the partnership assets of the late firm; (2) he recommended the allowance in favor of Thomas Lewelling of the further sum of \$1,000 against the partnership assets, because in his opinion it was the intention of the parties when they had the deed of partition prepared, which was never signed, that Thomas Lewelling should have an extra lot on Chapel street, Newport News, of the estimated value of \$1,000; and (3) that the \$575.98 which had been paid to the widow of James Lewelling, deceased, for her dower interest in lands sold in said chancery causes should be charged alone against his interest in the partnership assets.

Upon the coming on of the master's said report, and in dealing with that part of it relating to the partnership transactions

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of the Lewelling Brothers, with which alone we are concerned in this controversy, the circuit court decreed as follows:

“And the court proceeding as far as now practicable to settle the partnership affairs of Lewelling Brothers, doth ascertain that the settlement attempted to be made by the partners in their lifetime would have been, if carried out, fair and just, had the property been partitioned subject to the partnership debts, the court doth substantially adopt the said settlement, and doth ascertain and doth adjudge that the said James W. Lewelling in his lifetime received from the said partnership a house and lot in the city of Newport News of the value of \$1,000.00, and that Mrs. Henrietta Lewelling, widow of James W. Lewelling, received as dower from the proceeds of the sale of partnership property required for the payment of the partnership debts the sum of \$575.98, but that Thomas L. Lewelling received for his own use from Lewelling Brothers out of a loan made by Schmelz Brothers the sum of \$800.55, which said sums shall be allowed in the final settlement in these proceedings.”

From that part of the decree quoted this appeal was allowed the widow and the two infant heirs of James Lewelling, deceased.

In the report of the commissioner, in reference to the transactions of the partnership of the Lewelling Brothers and the requirement of the decree of reference, that a statement and settlement of “the demands of each of the former partners against the other, arising or growing out of the transactions in any of the above entitled causes,” it is said: “Under this head your commissioner would report that in order to try and arrive at some sort of satisfactory settlement of the above partnership transactions he has taken nearly two hundred pages of evidence, which he hereto appends; and has carefully examined hundreds of vouchers, checks, receipts and other papers submitted to him, as well as the papers, checks and other exhibits which were filed with the depositions. That there are really no books of the partnership concern, except such as show the open

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accounts of outside people dealing with the firm. So far as the transactions of Thomas L. Lewelling and James W. Lewelling, each with the other, go, there is practically no documentary evidence from which a balance and settlement may be arrived at with any degree of accuracy."

Further on the commissioner reported, that he had to reject a number of statements filed before him in the interest of Thomas Lewelling and adverse to the interests of his deceased brother and former partner, "except in so far as they are sustained by other records, inasmuch as the records from which they are obtained are so meagre and the evidence concerning them so unsatisfactory. There are no books of original entry which show these various items clearly enough for your commissioner to feel satisfied of their accuracy. It appears that the accounts were kept by Mr. Thomas L. Lewelling, and he was really the managing partner of the concern. This being the case, the burden of proof is placed upon the partner keeping them." Citing ample authority for that statement, viz.: 22 A. & E. Enc. L. 127; *Bevans v. Sullivan*, 4 Gill (Md.) 383.

The decree appealed from upon its face very clearly indicates that the conclusions reached adverse to appellants were purely speculative and conjectural, and that such was the case is abundantly borne out by the record.

The case of *Slater, Myers & Co. v. Arnett*, 81 Va. 432, is in point, where it is said: "As the partnership transactions cannot be settled upon any basis at all rational now, the books being so badly kept as to be worthless, and there being no evidence produced by either side upon which the court could proceed towards any rearrangement of the affairs, what can be done except to leave them as the brothers did when both were living and arranging their business between themselves?"

In *Ryman v. Ryman*, 100 Va. 24, 26, 40 S. E. 96, the opinion by Harrison, J., says: "It is the duty of each partner to keep a correct account of his transactions. Where a partner

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fails in this regard, he will be held to strictest account, and every reasonable presumption will be made against him.

“Where there is a dispute in regard to partnership matters, and either party or both parties have been so negligent as to lose the evidence of the partnership and to keep their accounts in such a confused way that the court cannot see what decree would do justice between the parties, the court will be unable to make a decree at all, and will dismiss the bill. . . .

“In the case last cited (*Hall v. Claggett*, 48 Maryland, 223) it is said that, if there has been a total failure to keep accounts, it affords good reason for a court of equity to refuse to settle them, without a sufficient reason or excuse for the omission. A court of equity will not grope its way in utter darkness, and undertake to create and establish an agreement upon mere contingencies, or the preponderance of mere possibilities or probabilities. There is no duty devolving upon it to assume the impracticable task of adjusting the relative rights of parties when the proof is totally deficient and inconclusive. . . .

“It appears that appellant has kept no books, and has retained no account of any description. The voluminous record sheds no light upon the accounts between the brothers during the period of the alleged partnership. There is no reliable basis upon which to rest any correct ascertainment of the rights of the parties; in this respect all is darkness and confusion. It would have been difficult to settle the account of these farming operations in the father’s lifetime. Now that his lips are sealed, it would be an impossible task to adjust the relative rights of the parties with any hope of doing justice.”

The rule uniformly recognized by the authorities, that a court of equity, in cases like this, can do no better than to withhold its hand and leave the parties to stand where they had placed themselves, is a salutary one, and any other would open the door for fraud on the part of a surviving partner upon the estate of the deceased partner or the rights of his heirs and distributees, especially where, as in the case before us, the surviving partner and brother of the deceased partner had practically the exclu-

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sive control of the affairs and dealings of the partnership, and was alone responsible for there not being proper books and accounts kept showing with some degree of certainty the status of the accounts between the members of the partnership.

We are of opinion that in the light of the authorities and in view of the record before us, it was impossible for a court of equity, without resort to speculation or conjecture, to afford the relief sought by appellee, Thomas L. Lewelling; therefore, his bill should have been dismissed, and this court will enter the decree the circuit court should have entered, dismissing said bill with costs to appellants, and remanding the cause for such further proceedings therein as may be necessary and proper, not in conflict with the views herein expressed.

*Reversed.*

Syllabus.

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**Richmond.**

LETERMAN v. CHARLOTTESVILLE LUMBER CO.

March 10, 1910.

1. PLEA IN ABATEMENT—*Non-Joinder of Partner as Defendant—Adverse Finding—Effect as Res Judicata.*—Where a defendant to an action on contract pleads in abatement that the contract was entered into by him on behalf of a firm composed of himself and another who should be united as a defendant, a finding against the defendant on this plea establishes the fact that the contract was made with the defendant personally and not with the firm, and that the plaintiff has the right to sue the defendant for a breach of the contract, but it does not determine that the defendant, in making the contract, was not acting for the firm.
2. PRINCIPAL AND AGENT—*Personal Liability of Agent—Rights of Third Persons.*—An agent may become liable on a contract contrary to his actual intention, but if he contracts in such form or under such circumstances as to make himself personally liable, he cannot afterwards, whether his principal was or was not known at the time of the contract, relieve himself of that responsibility.
3. PRINCIPAL AND AGENT—*Undisclosed Principal—Rights and Liabilities of Agent and Other Party.*—When a non-negotiable simple contract is entered into between an agent of an undisclosed principal and a third person, the latter may, as a general rule, hold either the agent or his principal, when discovered, personally liable on the contract, but he cannot hold both. So, likewise, either the agent or his principal may sue upon such a contract; the defendant, when the principal sues upon it, being entitled to be placed in the same situation at the time of the disclosure of the real principal, as if the agent had been the contracting party. If the agent is sued the plaintiff recovers such damages as have resulted from the breach of the contract by him. If the agent sues, he is entitled to recover (unless his principal interferes in the suit) the full measure of damages in the same manner as though the action had been brought by the principal.
4. PRINCIPAL AND AGENT—*Undisclosed Principal—Action Against Agent—Defense Under Section 3299 of Code—Beneficial Interest of*



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*Principal.*—An agent of an undisclosed principal when sued upon the contract by the other party thereto may, under section 3299 of the Code, set up as a defense any matter which would entitle him either to recover damages at law from the plaintiff or the person under whom the plaintiff claims, or relief in equity, in whole or in part, against the obligation of the contract sued on. He is entitled to the same relief as could be obtained in an independent action brought for the same cause. He is deemed to have brought an action at the time of filing the plea. If the agent defends under section 3299 of the Code, it is no ground of objection to the plea that the beneficial interest in the recovery, if any, is in another, or that the agent will have to account to another.

5. PRINCIPAL AND AGENT—*Undisclosed Principal—Action Against Agent*—*Defense Under Section 3299 of Code.*—If an agent of an undisclosed principal is sued by the other party to the contract for the price of work done, the agent may, under section 3299 of the Code, set up the damages resulting from the failure of the plaintiff to do the work, and get the benefit of such damages as fully as if he had instituted an independent action to recover them.

6. PLEADING—*Recoupment at Common Law and Under Section 3299 of Code.*—When the demands of both parties spring out of the same simple contract, the defendant may assert a claim for unliquidated damages under his common law right of recoupment, or under section 3299 of the Code, which does not impair his common law right, but, in addition thereto, permits the defendant to recover any legal damages he can prove in excess of the damages claimed by the plaintiff.

Error to a judgment of the Corporation Court of the city of Charlottesville in an action of *assumpsit*. Judgment for the plaintiff. Defendant assigns error.

*Reversed.*

The opinion states the case.

*Perkins & Perkins* and *H. W. Walsh*, for the plaintiff in error.

*George E. Walker* and *John W. Fishburne*, for the defendant in error.

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BUCHANAN, J., delivered the opinion of the court.

In the view we take of this case the only question necessary to be considered is whether or not the trial court erred in striking out the special plea filed by Leterman (the plaintiff in error), who was defendant in that court.

One objection made to the plea is "That the plea sets forth the fact that the contract between the plaintiff and defendant was entered into by the defendant on behalf of a firm, composed of himself and one Alfred Wollberg, which matter has been already formally and finally adjudicated by submitting that question to a jury at a former term of this court, as is shown in writing filed by the plaintiff, by counsel, as one of the grounds for excluding said plea."

The only effect of the verdict of the jury upon the issue raised by the plea in abatement for the non-joinder of Alfred Wollberg as a party defendant was to establish the fact that the contract, for the breach of which the plaintiff sought to recover damages, was made with Leterman personally, and not with the firm of Leterman & Wollberg; and that the plaintiff had the right to sue the former for a breach of the contract. It did not determine that Leterman, in making that contract, may not have been acting, as averred in his special plea, in behalf of the firm of Leterman & Wollberg. That question was not involved in the issue on the plea in abatement. An agent may even become liable on a contract contrary to his actual intention; but if he contracts in such a form or under such circumstances as to make himself personally responsible, he cannot afterwards, whether his principal was or was not known at the time of the contract, relieve himself of that responsibility. 2 Clark & Skyles on Agency, sec. 566, and cases cited; 1 Min. Inst., 235-7; 3 Rob. Pr. (New), 54, and authorities cited.

Another objection made to the plea is that it "attempts to set off the claim of the partnership of Leterman & Wollberg

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against the individual demand of the plaintiff against the defendant."

Where a person enters into a simple contract, oral or in writing, other than a negotiable instrument, in his own name, when he is in fact acting as the agent of another and for his benefit, without disclosing his principal, the other party to the contract may, as a general rule, hold either the agent or his principal, when discovered, personally liable on the contract. But he cannot hold both. 1 Min. Inst., p. 236-7, and cases cited; 3 Rob. Pr. (New), 50, and cases cited; Clark & Skyles on Agency, secs. 457, 568.

It is also equally well settled that upon such a contract either the agent or the principal may sue; the defendant, where the principal sues upon it, being entitled to be placed in the same situation at the time of the disclosure of the real principal as if the agent had been the contracting party. *National Bank v. Nolting*, 94 Va. 263, 26 S. E. 826; 3 Rob. Pr. (New), 36, and cases cited; 1 Min. Inst. 239, and cases cited; Clark & Skyles on Law of Agency, sec. 614.

If the agent of the undisclosed principal be sued by the other party to the contract the latter may recover such damages as have resulted from the breach of it on the agent's part. On the other hand, if such agent sues, he may recover such damages as have resulted by reason of the breach of the contract by the other party—unless his principal interferes in the suit; and he is entitled to recover the full measure of damages in the same manner as though the action had been brought by the principal. See Clark & Skyles on Agency, sec. 624; Mechem on Agency, secs. 755, 763; *Joseph v. Knox*, 3 Camp. 320, 321-2; *Gardner v. Davis*, 2 Car. & Payne, 49; *United States Tel. Co. v. Gildersleeve*, 29 Md. 232, 96 Am. Dec. 519, 522-3; *Rhoades v. Blackiston*, 106 Mass. 334, 8 Am. Rep. 322, 333-4; 31 Cyc. 1564; *Shelby v. Burrow*, 76 Ark. 558, 89 S. W. 464, 1 L. R. A. (N. S.) 303; 6 Am. & Eng. Ann. Cases, 554, and note.

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There are exceptions to the general principles of law stated above, but they do not affect the question now under consideration, and need not, therefore, be mentioned.

Since either party to the contract set up in the special plea had the right to sue the other for its breach, if he failed to keep and perform it on his part, it follows that either, when sued by the other for its breach, had the right to set up as a defense, under section 3299 of the Code, any matter which would "entitle him either to recover damages at law from the plaintiff or the person under whom the plaintiff claims, or relief in equity, in whole or in part, against the obligation of the contract" sued on.

"The plain purpose of that section," as said by Judge Moncure in *Huff v. Broyles*, 26 Gratt. 283, 285, "was to give precisely the same measure of relief on a plea filed under the same as could be obtained in an independent action brought for the same cause . . ." See *Am. Manganese Co. v. Va. Manganese Co.*, 91 Va. 272, 282, 21 S. E. 466; *Columbia Accident Co. v. Rocky*, 93 Va. 678, 25 S. E. 1009; *Mangus v. McClelland*, 93 Va. 786, 22 S. E. 364; *Tyson v. Williamson*, 96 Va. 636, 32 S. E. 42; *Kinzie v. Riely, Ex'or*, 100 Va. 709, 42 S. E. 872.

By section 3303 of the Code it is declared that a defendant who files a plea under section 3299 shall be deemed to have brought an action at the time of filing such plea.

The defendant having the right to set up in a special plea under section 3299 any damages which resulted from a breach of the contract, which he could have recovered in an independent action, the fact that his recovery over, if any, was for the benefit of Leterman & Wollberg furnished no ground of objection to the special plea; for it is settled that if the agent of an undisclosed principal sues, it is no ground of defense that the beneficial interest is in another, or that the plaintiff, if he makes a recovery, will be bound to account to another. See *Rhoades v. Blackiston, supra*; *United States Tel. Co. v. Gildersleeve, supra*;

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*Joseph v. Knox, supra; Seaman v. Slater* (C. C.), 49 Fed. 37; Clark & Skyles on Agency, sec. 619; Mechem on Agency, sec. 755.

The damages claimed in the special plea, as it avers, resulted from the failure on the part of the plaintiff to do the work, to recover the price of which he brought his action, in the manner and within the time provided by the contract, and the defendant had the right, under section 3299 of the Code to set them up and to get the benefit of them in this action as fully as if he had instituted an independent action to recover them. No prejudice can result to the plaintiff from compelling him on his part to answer for not performing the contract to the agent whom he is holding for its breach instead of the principal.

The remaining objection made to the special plea is that the claim set up in it is for unliquidated damages.

When the demands of both parties spring out of the same contract the defendant may assert a claim for unliquidated damages under his common law right of recoupment, or under section 3299 of the Code, which does not impair his common law right, but, in addition thereto, permits the defendant to recover any legal damages he can prove in excess of the damages claimed by the plaintiff. *N. N. & O. Ry., &c., v. Bickford*, 105 Va. 182, 52 S. E. 1011; 5 Rob. Pr. 267; *Columbia Accident Asso. v. Rockey, supra*.

The judgment complained of must, therefore, be reversed, the verdict of the jury set aside, the order striking out the special plea reversed and annulled, and the cause remanded to the corporation court for further proceedings to be had not in conflict with the views expressed in this opinion.

*Reversed.*

Statement.

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**Richmond.**

MOORE LUMBER CORPORATION AND ANOTHER v. WALKER AND  
WILLIAMSON.

March 10, 1910.

Absent, Buchanan, J.

1. STATUTE OF FRAUDS—*Objections After Verdict—Waiver—Appeal.*—It is too late, after verdict, to object that the contract sued on was proved by parol testimony when the statute of frauds required it to be in writing. The failure to object at the proper time is a waiver of the statute, and the case must be heard and determined in the appellate court upon the same evidence upon which it was heard and determined in the trial court.
2. EVIDENCE—*Inadmissibility—Offering Same Evidence—Waiver.*—If a party objects to the introduction of evidence which is admitted, and afterwards introduces the same evidence himself, it is not ground for reversing the judgment, although the evidence objected to was incompetent.
3. GUARANTY—*Consideration.*—Furnishing money to a third person at the instance of one who guarantees its payment is a sufficient consideration for the guaranty.
4. EVIDENCE—*Order of Introduction—Objection—Waiver.*—An exception to the action of the court in refusing to admit a letter in evidence at a particular stage of a case, but with notice that it may be offered later, is waived by a failure to offer the letter at a later stage of the proceedings. The order of introduction of evidence lies largely in the discretion of the trial court, whose ruling will not be reversed save in very exceptional cases.
5. EVIDENCE—*Admissibility—Self-Serving Declarations.*—A letter which is self-serving and written after all dealings between the plaintiff and the defendant have terminated is properly rejected as evidence.

Error to a judgment of the Law and Chancery Court of the city of Norfolk in a proceeding by motion for a judgment for money. Judgment for the plaintiffs. Defendants assign error.

*Affirmed.*

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The opinion states the case.

*J. Sydney Smith*, for the plaintiffs in error.

*Thorp & Bowden*, for the defendant in error.

WHITTLE, J., delivered the opinion of the court.

The judgment under review was recovered by the defendants in error, Walker and Williamson, plaintiffs below, against the plaintiffs in error, the H. P. Moore Lumber Corporation and C. W. Cake, in a motion for money upon the general issue as to both defendants, and a special plea of set-off interposed by the lumber company.

The *gravamen* of the latter plea is that the plaintiffs had appropriated to their own use certain personal property belonging to the H. P. Moore Lumber Corporation, the value of which was in excess of the demand upon which their motion is based. Inasmuch, however, as that issue was resolved by the jury in favor of the plaintiffs upon a conflict of evidence, and their verdict approved by the trial court, that assignment of error does not call for further notice.

The essential facts of the case, considered as upon a demurrer to the evidence, are as follows: In June, 1907, the H. P. Moore Lumber Corporation engaged the services of the plaintiffs, who were lumber brokers in the city of Norfolk, to handle on commission the entire output of their sawmill, located in Gates county, North Carolina. The course of dealing between the parties made it necessary for the plaintiffs, from time to time, as the exigencies of the business required, to make advances to defray the running expenses of the mill. Such advances were to be refunded and the plaintiffs' commissions paid out of the proceeds realized from sales of lumber received from the mill. The avails from these sales proved inadequate to meet the advances, and early in September, 1907, the lumber company was

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found to be indebted to the plaintiffs in the sum of \$1,100. In this state of affairs the president of the company, Hockaday Moore, called on the plaintiffs, as usual, for money to meet the mill's roll, but they refused to make any further advances on the faith of the output of the mill. Thereupon Moore left their office, but returned the next day bearing the following note:

"Norfolk, Va., Sept. 17, 1907.

"Messrs. Walker and Wmson,

"Gentlemen:

"I did not get down to your office yesterday, but any arrangement Hockaday makes with you I will stand by him, and back him all the way through.

"Yours,

"C. W. CAKE."

It was then agreed between the plaintiffs and Hockaday Moore that they would continue to make such advances as might be necessary to meet the running expenses of the mill, and if at the close of their dealings the sales of lumber were found to have netted less than the advances, that C. W. Cake should be personally answerable to the plaintiffs for the deficiency. The demand which is the subject of this litigation is founded upon the foregoing agreement.

Cake denies liability on the ground that the paper signed by him is not sufficient under the statute of frauds to make him responsible for the debt or default of the H. P. Moore Lumber Corporation, "for the reason that without verbal testimony there is nothing to show any connection between it and said corporation, and that verbal testimony is not admissible to splice out a liability predicated upon a defective writing. No consideration was shown for the guaranty."

For the purposes of this case it is immaterial whether the writing in question is or is not sufficient, by its terms, under the statute of frauds, to fix responsibility upon Cake for the debt



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of his codefendant. The writing was put in evidence by the defendants themselves, the defense of the statute of frauds was not relied on, and the plaintiffs, without objection, proved by parol evidence their agreement with Hockaday Moore, the agent of C. W. Cake; so that, if there be merit in the objection as an original proposition (as to which we express no opinion), it was not made until after verdict, and must be considered as having been waived.

In *Eaves v. Vial*, 98 Va. 134-140, 34 S. E. 978, 980, Judge Buchanan, in delivering the opinion of the court, observes: "The action of the appellant in permitting the case to be heard and determined by the trial court upon the oral testimony taken to prove the agreement, without objection, must, we think, be regarded as a waiver of the statute of frauds and of the rule of law that contemporaneous oral evidence is not admissible to vary the terms of a written agreement, and the case must be heard and determined by this court upon the same evidence upon which it was heard and determined in the trial court. *Miller v. Harper*, 63 Mo. App. 293; *Allan v. Richard*, 83 Mo. App. 55; *Tibbs v. Weatherwax*, 23 Cal. 58; *Zabel v. Myenhuis*, 83 Iowa 756, 759 [49 N. W. 999]. See also *McVeigh v. Chamberlain*, 94 Va. 73 [26 S. E. 395], and cases cited; 4 Min. Inst. (3d ed.), 845." See also *Burkholder v. Ludlam*, 30 Gratt. 255, 32 Am. Rep. 668.

In 8 Enc. Pl. & Pr. 217, it is said: "Such objections come too late after a cause has gone to the jury, or after verdict, or on a motion for a new trial. Nor is it proper practice to permit such an objection to be raised for the first time by motion to instruct the jury to disregard the evidence."

Moreover, the plaintiffs in error cannot complain that verbal evidence was admitted in connection with the writing in question, since the defendant, Cake, in his oral testimony undertook to explain its purport.

In *New York Life Ins. Co. v. Taliaferro*, 95 Va. 522, 28 S. E. 879, it was held: "If a party objects to the introduction of

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evidence which is admitted, and afterwards introduces the same evidence himself, it is not ground for reversing the judgment, although the evidence objected to was incompetent.”

The consideration for the guaranty was clearly sufficient. The testimony of the plaintiffs shows that they had declined to make further advances for the lumber company, and were induced to do so by Cake's guaranty and the arrangement made by him through his agent, Hockaday Moore. See Clark on Contracts, 147, 149.

The remaining assignments of error which need be noticed involves the action of the court with respect to a letter offered in evidence, written May 5, 1908, by Cake to the plaintiffs, in which he undertakes to interpret the meaning of his former letter. The court refused to admit the letter at that time, but notified counsel that it might be offered later on in the trial.

In *Norfolk, &c., Co. v. Morris*, 101 Va. 422, 44 S. E. 719, this court held that “The order in which evidence is introduced is a matter largely in the discretion of the trial court, for which this court will not reverse a judgment, save in very exceptional cases.”

Besides, the failure of the defendants to avail themselves of the leave of the court to offer the letter at a later stage of the proceedings was a waiver of the first exception. *N. & W. Ry. Co. v. Anderson*, 90 Va. 1, 17 S. E. 757, 44 Am. St. Rep. 884.

But in addition to these considerations, the letter might well have been excluded on the ground that it was self-serving and written after all dealings between the plaintiffs and the defendants had terminated. *Southern Ry. Co. v. Wilcox*, 99 Va. 394, 39 S. E. 144.

Upon the whole case, we are of opinion that the judgment complained of is plainly right, and it must be affirmed.

*Affirmed.*

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Statement.

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**Richmond.****MILLER AND OTHERS v. PENNIMAN AND BRO. AND OTHERS.**

March 10, 1910.

Absent, Buchanan, J.

1. **ATTORNEY AND CLIENT—Defalcation of Agent—Loss of Funds—Case in Judgment.**—Pending a controversy between first and second class creditors over a fund a check for the fund was drawn payable to the counsel of said creditors, jointly. Each of the counsel endorsed the check and delivered it to one of the counsel for creditors of the second class with the understanding that he would place it in bank to their joint credit. He failed to do this, and appropriated the money to his own use, and only a part of it has been realized by the creditors of the first class since the controversy was decided in their favor. The question is who shall bear the loss, as between the creditors, of so much of the fund as has not been realized.

*Held:* The whole check must be credited, as of its date, upon the claims of the first class creditors. Their counsel in endorsing and delivering the check to one of the counsel for creditors of the second class, with the agreement aforesaid, constituted him the agent of the parties endorsing the check, and the agent in collecting and misappropriating the proceeds of the check was acting for himself, and not for his clients. The second class creditors cannot be made to pay the penalty of misplaced confidence in the agent of the other counsel.

2. **EQUITY PRACTICE—Attorney's Claim to Funds—Accounting—When Refused.**—After the funds in a cause have passed beyond the control of the court, and the cause is practically ready for a final decree, a court of equity will not, at the instance of the counsel for some of the parties (who has paid no attention to the case for years, and whose clients have been, in the meantime, represented by other counsel) order an account to ascertain what is due to him from his clients for services rendered in the cause.

Appeal from a decree of the Circuit Court of Franklin county.  
From an adverse decree the creditors of the first class and their

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counsel, and T. W. Miller, who filed a petition in the cause, appeal.

*Affirmed.*

The opinion states the case.

*Scott, Buchanan & Cardwell, H. M. Altizer, P. H. Dillard and Thos. W. Miller, for the appellants.*

*S. & M. Griffin, L. W. Anderson, and Poindexter & Hopwood, for the appellees.*

HARRISON, J., delivered the opinion of the court.

On March 15, 1884, Marshall Waid conveyed certain real and personal estate to a trustee to secure his creditors. On April 14, 1884, two of the creditors of Waid, represented by R. E. Scott, attorney, obtained judgments against their debtor. On May 20, 1884, five judgments were obtained against Waid by other creditors, one represented by Messrs. Dillard and Dupuy, attorneys, and the remaining four by Messrs. Miller and Smith, attorneys. Upon the recovery of these judgments proceedings were had in which the deed made by Waid was held to be in fraud of his creditors and void, and the personal property thereby conveyed was subjected to the payment, in part, of the judgments mentioned, under an agreement between the several plaintiffs that they would act together and distribute the proceeds of the personal property *pro rata* among themselves, which was done. Shortly thereafter the present suit was brought by the Roanoke National Bank, a creditor of Waid, to enforce satisfaction of its judgment.

In this proceeding the real estate conveyed by Waid was ordered to be sold, and the proceeds distributed among his creditors whose liens were proven in the cause according to their priority. On June 2, 1893, the sale commissioner had in his hands for distribution the sum of \$1,873.54. R. E. Scott, rep-

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representing the first class creditors, insisted that the whole of this sum was applicable to the judgments in favor of his clients, while T. W. Miller contended that the method of distribution agreed upon with respect to the personal property extended also to the proceeds of the real estate, and that the second class creditors represented by him were entitled to share with the first class creditors *pro rata*. Thereupon it was agreed between the parties that this question should be decided by Messrs. Dillard and Dupuy, and that all concerned would abide by that decision.

In the meantime the commissioner, for his own protection, gave his check for the \$1,873.54, payable to all of the counsel representing the first and second classes of creditors, to be applied in accordance with the determination by Messrs. Dillard and Dupuy of the question at issue. This check was endorsed by each of the counsel and left in the hands of T. W. Miller, attorney, with the understanding that he would deposit it in bank to their joint credit until the right to its proceeds was determined.

Messrs. Dillard and Dupuy decided that the agreement with respect to the distribution of the proceeds of the personal property did not extend to the proceeds of the real estate, and that the whole proceeds of the check was applicable to the judgments represented by R. E. Scott, they being prior to all others. After this conclusion was reached, R. E. Scott found that T. W. Miller, instead of depositing the check, in accordance with their agreement, to their joint credit, had deposited the same to his individual credit, and had appropriated the proceeds to his personal use. The record shows that between December, 1893, and January, 1899, R. E. Scott succeeded in collecting from T. W. Miller \$1,623.54 of this money, leaving in his hands a considerable sum that has never been paid.

Mr. Scott now contends that the judgments of the first class represented by him should not be credited with the check for \$1,873.54 payable to Scott, Miller and Dillard, but should only

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be credited with such part of the proceeds of that check as he had succeeded in collecting from Miller.

On the other hand it is contended, on behalf of the second class creditors, that the whole of the check in question must be credited, as of its date, upon the claims of the first class creditors.

This was the first question submitted for decision, and the circuit court properly held in accordance with the contention of counsel representing the second class creditors. The check was made payable to Scott, Miller and Dillard, so that each of said attorneys might be in a position to protect his interest, if any, in the proceeds. No part of this check could have been collected by Miller without Scott's endorsement and consent. Mr. Scott, in endorsing the check and delivering it to Miller thereby made the latter his agent to place the money in bank to the joint credit of Scott, Miller and Dillard until the question of the terms of the agreement mentioned could be determined, and Miller, in placing the check to his individual credit, and appropriating the proceeds to his own use, was acting for himself, and not for his clients. Clearly the second class creditors should not be made to pay the penalty of Mr. Scott's misplaced confidence in Miller. Mr. Scott has very properly, as the record shows, satisfied his clients with respect to this matter, and he can now look only to T. W. Miller for his own satisfaction.

The second and only other question raised by the petition for appeal involves the right of T. W. Miller to have this cause referred to a commissioner to ascertain his compensation for alleged services to certain second class creditors.

The record shows that at the beginning of these proceedings T. W. Miller represented several of the second class creditors, and that he collected certain sums belonging to his clients. The record is silent as to the cause, but it shows that after these collections had been made the clients of Mr. Miller abandoned him as their counsel, and employed other counsel to collect their claims. It further appears that these new counsel have collected

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from the court's commissioners very nearly, if not all, that is to be realized, and have paid the same over to their clients. Years after Mr. Miller's disappearance from the cause, and at the time it was about going into the hands of the court for practically its final disposition, he files a petition asking that his former clients be required to pay him a fee equal to one-half of their respective debts, and that the cause be referred to a commissioner to take certain accounts with respect to his claim. The circuit court declined to accede to this proposition, and dismissed the petition, holding that the claim set up by Mr. Miller was a matter between him and his clients that could not be adjudicated in this cause.

It is quite clear from the record that the fund due to the former clients of Mr. Miller had passed beyond the control of the court. The decree dismissing his petition, which is the decree appealed from, directs the commissioners to disburse the balance in their hands, if any, to the judgment creditors, the language, "if any," implying a doubt as to the existence of any residue. But be that as it may, Mr. Miller has stood by for years and allowed this cause to proceed without any attention on his part. His former clients long ago ceased to look to or depend upon him, and have since been represented by other counsel of their selection, through whom they have realized their rights. There is nothing in the record to suggest any merit whatsoever in the claim now asserted by Miller, but the contrary, and the court properly declined, at this late day, to refer the cause to a commissioner for its consideration.

The decree appealed from must be affirmed.

*Affirmed.*

Statement.

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**Richmond.**

**NATIONAL CASH REGISTER CO. v. BURROW AND MARTIN, TRUSTEES, AND ANOTHER.**

March 10, 1910.

Absent, Buchanan, J.

1. **SALE OF CHATTELS—Reservation of Title or Lien—Statutory Requirements—Constructive Notice—Case at Bar.**—Under the provisions of section 2462 of the Code, if a vendor of chattels wishes to retain the title to or a lien on such chattels, as against subsequent purchasers or creditors, the contract must be in writing, signed by the vendor and vendee, and the vendor must cause to be docketed and indexed "from the original contract" a memorandum setting forth the date of the contract, the amount due thereon, when payable, how payable, a brief description of the goods or chattels, and the name of the vendor and vendee. All of these requisites must be complied with in order that the docketing may constitute constructive notice. The docketing of a contract providing for notes payable in monthly installments after maturity of first note, but authorizing the purchaser to date the first note at such time as he may elect, and to insert the date either before or after the execution of the note, does not give notice of when and how the deferred payments are to be made, is not a sufficient compliance with the statute, and hence is not constructive notice.
2. **REGISTRY—Constructive Notice—Description of Property.**—In order that the registry of a conveyance may operate as constructive notice to subsequent purchasers and incumbrancers the instrument must afford the means of not only ascertaining with accuracy what property is conveyed or affected by the instrument registered, and where it is, but its language must be such that, if a subsequent purchaser or incumbrancer should examine the instrument itself, he would obtain thereby actual notice of all the rights which were intended to be created or conferred by it.



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Error to a judgment of the Circuit Court of the city of Norfolk, in an action of detinue. Judgment for the defendants. Plaintiff assigns error.

*Affirmed.*

The opinion states the case.

*Jeffries, Wolcott, Wolcott & Lankford*, for the plaintiff in error.

*Alan G. Burrow and Jas. G. Martin*, for the defendants in error.

CARDWELL, J., delivered the opinion of the court.

The Victoria Hotel Corporation, of the city of Norfolk, Va., bought from the National Cash Register Company two cash registers on the installment plan, entering into a contract purporting to set forth the price of the registers, when and how the deferred payments therefor were to be made payable, etc. The vendor sought to record said contract in the clerk's office of the Corporation Court of the city of Norfolk, so as to hold title to the registers in question against subsequent purchasers and creditors until the whole purchase money was paid, as provided by section 2462 of the Code of 1904. The vendee, a few months thereafter, made a deed of assignment, conveying its property (with certain named exceptions) to Burrow and Martin, trustees, for the benefit of the creditors of the grantor. These trustees took possession of the property conveyed to them, including the cash registers in question, claiming them as purchasers for value, in good faith and without any notice of reservation of title to or against the registers, and said trustees having refused to deliver the registers to the National Cash Register Company, it instituted this action of detinue for the recovery thereof.

Upon the trial of the case the circuit court, without the intervention of a jury as the parties had agreed, in effect held

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that the plaintiff was entitled to a judgment for the registers sued for as against the Victoria Hotel Corporation, but that the contract under which the plaintiff claimed the right to have them delivered to it was either incapable of being docketed, or was not a sufficient compliance with the statute, as against the trustees, Burrow and Martin, and therefore they were entitled to retain the same for the benefit of the creditors secured in said deed of trust, and judgment was entered accordingly. That judgment, in so far as it denied the plaintiff a recovery against Burrow and Martin, trustees, is before us for review upon a writ of error awarded by one of the judges of this court.

It is conceded in the record that the defendants in error had no actual notice of the contract relied on by plaintiff in error. Therefore the question for determination is whether or not the contract in question was (1) capable of being registered under the statute, and (2) was it sufficiently descriptive of the property to which title was sought to be retained by the vendor till the purchase money therefor was paid, to constitute constructive notice to third persons?

In determining these questions we have first to look to the statute authorizing the registry or recordation of such contracts in order that a vendor of a chattel may retain title thereto, not only against the vendee but third parties, until the purchase money therefor is fully paid; and then to the contract as registered or recorded in this case.

We do not deem it necessary to set out the statute at length. Suffice it to say, it requires that the registry or docketing of the contract must be done by the clerk "*from the original contract,*" and for the contract to be inherently capable of being docketed under the statute it must contain everything which the clerk must have before him to be put on the docket, to-wit: (1) Date of contract; (2) amount due thereon; (3) when payable; (4) how payable; (5) a brief description of the goods or chattels; and (6) name of vendor and vendee.

Before the question as to the sufficiency of the description of

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the goods is reached the antecedent questions have to be determined, viz., is the amount due on the contract, when and how payable, sufficiently stated in the contract to entitle the vendor to its registry or docketing by the clerk, and to the protection that the statute intends in such cases?

The statute requires the six requisites named above to appear in the contract, and that it be docketed and indexed "as herein provided for." In this case the contract, so far as it need be set out, is as follows:

"In consideration of the above, the undersigned to pay you five hundred and seventy-five dollars (\$575.00), \$60 cash with the order; \$——— cash upon arrival of register; \$515 note, payable in 10 monthly installments; 9 of \$50 each, with privilege, and 1 of \$65 to be executed by the undersigned upon such arrival.

"Cash less 5 *per cent.*, 30 days' privilege.

"You to allow the undersigned 5 *per cent.* discount for cash settlement made on arrival of register; but no discount to apply on allowance for registers taken in trade, nor on price of autographic registers, nor on other registers the price of which is \$30, or less.

"You are authorized to date above mentioned note at such time as you may elect and to insert such date either prior to or after the execution of such note.

"Should there be any failure to pay draft or other demand for cash payment and to execute such note for deferred payments when presented, it is agreed that the full amount of the purchase price shall at once become due and payable; should there be any default in the payment of an installment, it is agreed that all the remaining installments shall at once become due and payable, anything in the note to the contrary notwithstanding . . . ."

It will be observed that the vendee was authorized to date the above mentioned note (i. e., the note for first deferred payment) at such time as he might elect, and to insert such date

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either prior to or after the execution of such note; so that the time of payment of the other installments of the purchase money was made entirely dependent upon the date of the first note, these installments being payable monthly after its date, thus setting out an agreement between the parties that they may have fully understood, but failing entirely to provide any sort of notice to third parties as to when and how the deferred payments for the chattels in question were to be paid. The fact is that the note was dated May 20, 1907, nearly a month after the date of the contract (April 29, 1907), and as a matter of fact it might as well have been dated two years, or any other time later, under the authority given by the contract. Furthermore, it appears that the note of which we have been speaking was not dated until nearly a month after the supposed docketing of the contract; so that the contract, as presented to the clerk, which should have been capable of giving the required information as to when the balance of the purchase money for the cash registers in question was payable, could not have given such information until after the date of the note was inserted therein, and we concur in the view of counsel for defendants in error that without the complete note set out in the contract or attached thereto as a part thereof the contract was inherently incapable of being docketed under the statute.

The reasoning applied by this court in its opinion in the case of *Florance v. Morien*, 98 Va. 26, 34 S. E. 890, applies with equal force in this case. In that case the court was considering the question as to when a recorded conveyance of property would operate as constructive notice to subsequent purchasers or incumbrancers, and it was held: "If the property conveyed be so described or indentified in the conveyance that a subsequent purchaser or encumbrancer would have the means of ascertaining with accuracy what and where it is, and the language be such that, if he should examine the instrument itself, he would obtain thereby actual notice of all the rights which were intended to be created or conferred by it, the description is

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sufficient, and the registry of such conveyance operates as constructive notice to subsequent purchasers and incumbrancers." In other words, the registered or recorded instrument must afford to subsequent purchasers or encumbrancers the means of not only ascertaining with accuracy what property is conveyed or affected by the instrument registered or recorded and where it is, but its language must be such that, if a subsequent purchaser or incumbrancer should examine the instrument itself he would obtain thereby actual notice of all the rights which were intended to be created or conferred by it; and if it contained these essential requisites the registry or recordation thereof operates as constructive notice to subsequent purchasers and incumbrancers; otherwise not.

We are of opinion that the judgment complained of in this case is right, and it is affirmed.

*Affirmed.*

Statement.

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**Richmond.**

NATIONAL CASH REGISTER CO. v. NORFOLK CITY REALTY CO.  
AND OTHERS.

March 10, 1910.

Absent, Buchanan, J.

1. SALE OF CHATTELS—*Reservation of Title or Lien—Description of Chattels.*—The memorandum required to be docketed under section 2462 of the Code, on a conditional sale of, or reservation of a lien upon, chattels, in order to operate as constructive notice to subsequent purchasers and creditors, must contain such a description of said chattels as will enable such purchasers and creditors, by examination of the records, to obtain actual notice of all the rights which were intended to be created or conferred by the instrument docketed. An instrument which leaves the designation of the specific property resting exclusively in the minds of the parties fails to meet the fundamental purposes and requirements of the registry law. The description of property cannot be arrived at by applying the testimony of the parties to the descriptive matter in the deed. Such evidence is not in aid of something which requires explanation, but is supplying something which is entirely wanting.

Appeal from a decree of the Circuit Court of the city of Norfolk. Decree for defendants. Petitioners appeal.

*Affirmed.*

The opinion states the case.

*Jeffries, Wolcott, Wolcott & Lankford*, for the appellant.

*James E. Heath*, for the appellees.

CARDWELL, J., delivered the opinion of the court.

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This is an appeal from a decree of the Circuit Court of the city of Norfolk, and was argued and submitted in this court along with the case of the *National Cash Register Company v. Burrow and Martin, Trustees, ante*, p. 785, 67 S. E. 370, in which an opinion has just been handed down. Both cases arose under section 2462 of the Code, which provides for reservation of title to and liens on goods and chattels sold, and when such a reservation is to be void as to creditors and subsequent purchasers, etc. In the opinion just handed down the statute, so far as it applies peculiarly to these cases, was set out, and also the requisites of a contract intended as a reservation of title to goods and chattels sold; and it is therefore not necessary to repeat here the statute or these requisites, but we shall be content with a reference to said opinion.

In 1907 when appellee opened the hotel in the city of Norfolk known as the "Lynnhaven Hotel," it agreed to purchase from appellant six cash registers, one in a contract to itself at the price of \$85.00, and five in another contract for \$1,315.00, the terms on which the \$85.00 register was sold being \$15.00 cash on the arrival of the register, and \$70.00 evidenced by notes payable in seven monthly installments of \$10.00 each, to be executed by appellee upon its arrival, and the terms upon which the five machines named in the other contract were sold were \$650 cash upon delivery of the machines, and \$665 evidenced by a note payable in six months from the arrival of the machines, and executed by the purchaser upon their arrival.

These contracts were filed with the clerk of the Corporation Court of the city of Norfolk, to be docketed in a book in his office known as the memorandum docket, being the docket provided for by section 2462 of the Code, *supra*, and in which conditional sales and reservations of title are docketed, and it is claimed by appellant that the said contracts were duly docketed.

A chancery suit was subsequently instituted by Calvin B. Taylor against the Norfolk City Realty Company, Incorporated, appellee here, for the enforcement of various liens and

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other debts against the real estate of the defendant known as the "Lynnhaven Hotel," in which suit receivers were appointed to take charge of the property of the defendant company, and the proceedings in that suit were such as to convert it into a creditors' proceeding to subject the property of the defendant company to the payment of its debts. The receivers of the court took charge of the property, including the cash registers here in question, and upon their refusal to deliver these registers to the appellant, it filed a petition in the cause, asking that the court direct the receivers to deliver to it the said registers; and, upon the hearing of that petition, the court entered an order refusing to direct the return of the cash registers to the appellant, holding that the docketing of the contracts under which they were claimed was insufficient, and that the registers were properly in the hands of the receivers to be sold, and the proceeds applied to the debts of the defendant company. From that decree this appeal was taken.

The first of these contracts consisted of a written order addressed to the appellant, dated April 20, 190—, signed "Henry DeWaters, By Henry DeWaters," and endorsed thereon are the words and figures, "Accepted 4-24, 1907, 3001, The National Cash Register Company, By A. F. Siebert," and this written order directed the shipment, "to the undersigned at No. —, Lynnhaven Hotel, — Street. Mailing address — Street, as soon as possible, one of your No. 250 Registers, case to be A, denominations of keys to be Standard. This register to be used on the — counter barber business." Then follows the price to be paid and the terms, which terms however are stated to be "\$— cash with order; \$15 cash upon arrival of register; \$70 note, payable in 7 monthly installments of \$10 each, and — of \$—, to be executed by the undersigned upon such arrival; \$—." Then follow other stipulations and conditions which need not be quoted.

The second contract bears date December 19, 1906, and requests the shipment "to the undersigned at No. —. The



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Lynnhaven Hotel, ——— Street. Mailing address, ——— Street, as soon as possible, 2-79, 2-47, 1-43 Sp. 2, D. B. S. C. of your No. ——— Registers, case to be C. Denominations of keys to be as per attached arrangement. This register to be used on the ——— counter, hotel business.” Then follows the total price to be paid for the registers, on the terms: \$——— cash with the order; \$650.00 cash upon delivering of registers; \$665.00 note, payable in 6 months from delivering of registers, and to be executed by the undersigned upon such arrival; \$——” Then follow other terms and stipulations which need not be here mentioned, and upon the contract appear the words, figures and signatures as follows:

“Accepted, Jan. 2, 1907, 2721.

“(Sign here)

“NORFOLK CITY REALTY CO., Inc,

“By John Keewan Peebles, Archt.

“THE NATIONAL CASH REGISTER COMPANY,

“By John T. Watson, D. M.

“O. V. Bell. 486.”

On each of these contracts are endorsements of letters and figures wholly unintelligible of themselves, though they may have been, and doubtless were, fully understood by the parties who entered into or attempted to make the contracts.

The registry or recordation of the respective contracts in the office of the clerk of the Corporation Court of Norfolk city is as follows:

“Virginia:

“In the clerk’s office of the Corporation Court of the city of Norfolk, on the 30th day of October, 1908.

“The following is an abstract from Contract Book No. 25, page 122, in said office.

“Date of contract, 1907, April 20th.

“When docketed, 1907, May 4th, 10:15 A. M.

“Name of vendor, National Cash Register Co., Dayton Ohio.

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“Name of vendee, Lynnhaven Hotel, by Henry DeWaters, Norfolk, Va.

“Amount due on contract, \$85.00.

“Description of property, one No. 250 Cash Register, case to be A. Keys to be standard.

“Terms, \$15.00 paid cash and \$10.00 per month.

“Situated, Lynnhaven Hotel, Norfolk, Va.

“Teste: JAMES V. TREHY, Clerk,

“By E. J. Doran, D. C.”

“Virginia:

“In the clerk’s office of the Corporation Court of the city of Norfolk, on the 30th day of October, 1908.

“The following is an abstract from Contract Book No. 25, page 125, in said office.

“Date of contract, 1906, Dec. 19th.

“When docketed, 1907, March 2d, 4:15 P. M.

“Name of vendor, National Cash Register Co., Dayton, Ohio.

“Name of vendee, Norfolk City Realty Co., Inc., by John Kevan Peebles, agt., Norfolk, Va.

“Amount due on contract, \$1,315.00.

“Description of property, 2-79 D. B. Sp.

2-47. 1-13 Sp.-2.

“Cash register to be C. Keys to be as per attached.

“All arrangement.

“Terms, \$650.00 cash, and \$663.00 in 6 months.

“Situated at the Lynnhaven Hotel, Norfolk, Va.

“Teste: JAMES V. TREHY, Clerk.

“By E. J. Doran, D. C.”

The sole question presented for our consideration is whether or not the docketing or recording of these contracts is such a compliance with section 2462 as to operate as constructive notice to subsequent purchasers for value or encumbrancers. It is not claimed that the receivers of the court had actual notice of the

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contracts, or of the lien upon the cash registers in question claimed by appellant.

In the case of *National Cash Register Co. v. Burrow and Martin, Trustees, supra*, it was held that contracts of this character, as well as deeds of conveyance of property, when registered or recorded, must, in order to be efficacious as constructive notice to subsequent purchasers or incumbrancers, afford to subsequent purchasers or encumbrancers the means of ascertaining with accuracy what property is conveyed or affected by a lien thereon for the reservation of title thereto by the instrument registered or recorded, and that the language employed in the instrument must be such that if a subsequent purchaser or encumbrancer should examine the instrument itself he would obtain thereby actual notice of all the rights which were intended to be created or conferred by it; and that if the instrument did not contain these essential requisites the registry or recordation thereof would not operate as constructive notice to subsequent purchasers or encumbrancers.

The decision of this court in *Florance v. Morien*, 98 Va. 26, 34 S. E. 890, and the reasoning of the opinion in that case, apply with full force to the case here, and so does the case of *Hardaway v. Jones*, 100 Va. 481, 41 S. E. 957. See also *Parker v. Chase & Buck*, 62 Vt. 206, 20 Atl. 198, 22 Am. St. Rep. 99, which was an action of *trover* for the conversion of six cows; and it was held that while the description of a thing mortgaged in a chattel mortgage may not be sufficient to enable one to identify the property without inquiry, it must indicate the line of inquiry and furnish the basis for identification; and that a mortgage which leaves the designation of the specific property resting exclusively in the minds of the parties fails to meet the fundamental purposes and requirements of the law, that the result cannot be arrived at by applying their testimony to any descriptive matter in the deed; and that such evidence is not in aid of something which requires explanation, but is the supplying of something which is entirely wanting.

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An examination of these contracts as recorded will disclose that they fail even to suggest an intelligent inquiry which might be made by a subsequent purchaser or encumbrancer as to what goods or chattels were covered by the contracts, and they certainly fail to afford notice of all the rights which were intended to be created or conferred by them. The appellant appears to have been more anxious to sell and place with purchasers the products of its enterprise than it was prudent and cautious in complying with the plain requirements of our statute, under which and by compliance with which alone can there be a reservation of title to goods or chattels operative against subsequent purchasers of such goods or chattels for value and without notice, or encumbrancers.

We are of opinion that the decree of the circuit court is right, and it is therefore affirmed.

*Affirmed.*

Statement.

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**Richmond.**

NORFOLK AND WESTERN RAILWAY CO. v. CROWE'S ADMINIS-  
TRATRIX.

March 10, 1910.

Absent, Buchanan, J.

1. RAILROADS—*Personal Injury—Failure to Carry Headlight—Instructions.*—In an action to recover for a personal injury inflicted at a grade crossing an instruction which tells the jury that if they “believe from the evidence that the injury to the plaintiff was caused solely by the failure of the defendant to have the usual and customary headlight on its engine, they must find for the defendant, whether such failure was negligent or otherwise,” is of very doubtful interpretation, and calculated to mislead the jury, and is, therefore, properly refused. This is especially true where the instructions already given clearly expound the law applicable to the case.
2. APPEAL AND ERROR—*Verdict Contrary to Conceded Facts.*—Courts are not required to believe that which is contrary to human experience and the laws of nature, or which they judicially know to be incredible, and although a plaintiff in error occupies the position of a demurrant to the evidence, yet if the verdict of the jury is dependent for its support upon the testimony of a witness which is contradicted by the conceded facts in the case, it will be set aside and a new trial awarded. Testimony in conflict with conceded or undisputed facts cannot, in the nature of things, be true, and hence cannot form any basis for a conflict upon which to rest a verdict. A court is not bound to stultify itself by allowing a verdict to stand, although there may be evidence tending to support it, where the physical facts demonstrate such evidence to be untrue, and the verdict to be unjust and unsupported in law and in fact.

Error to a judgment of the Circuit Court of Dinwiddie county, in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

*Reversed.*

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The opinion states the case.

*Geo. S. Bernard, Wm. B. McIlwaine and Theo. W. Reath,*  
for the plaintiff in error.

*G. S. Wing,* for the defendant in error.

CARDWELL, J., delivered the opinion of the court.

John T. Crowe was struck and killed at a late hour of the night on June 14, 1907, by a passenger train of the Norfolk and Western Railway Company, while crossing its track on the public highway, and this suit was brought to recover of the railway company damages on account of his death. The jury on the trial rendered a verdict in favor of the plaintiff for \$9,000, and the court entered judgment in accordance with the verdict.

Upon three grounds this court is asked to review and reverse the judgment of the trial court: (1) Because the verdict was contrary to the law and the evidence; (2) because the court erred to the prejudice of the defendant in refusing to give to the jury a certain instruction offered by the defendant; and (3) because the damages awarded were excessive.

There are three counts in the declaration filed, and in the first and second counts the right of the plaintiff to recover was founded upon the negligence of the defendant in failing to ring the bell or sound the whistle on its engine as required by law; and the allegation of negligence in the third count is that the defendant also failed to have the usual and customary headlight on its engine, and that this act of negligence concurring with its alleged negligent failure to give the signals required by the statute when an engine approaches a highway crossing, caused the injury complained of.

It appears from the evidence that the deceased, a citizen of Dinwiddie county, living about five miles from Wilson station, on the defendant's line of railway, had come to the city of Peters-

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burg and was expected to return on the train due to arrive at Wilson station about midnight. One W. S. Rutledge was in the employ of the deceased, living at his home, and went to Wilson station to meet him, reaching there several hours before time for the train on which deceased was expected to arrive. Shortly after reaching Wilson, deceased got into an open buggy with Rutledge, and drove along the county road in a westerly direction towards the crossing, something less than a mile from the station, the county road running nearly parallel with the railroad and at no point more than a few hundred feet away from it. The roads were not good and the deceased, who was driving, went along slowly, at a walk all the way, until he reached a point eight steps, or from twenty to twenty-five feet, north of the crossing. When they reached this point both deceased and Rutledge got out of the buggy and walked up to the railway track, looking up and down the same, and listening for a train, but neither saw nor heard any train coming. They then walked immediately back from the track eight steps to the buggy, Rutledge getting in on one side and deceased on the other, and drove at once across the track, when they were struck by a train, Rutledge's arm being broken and the deceased being killed. Rutledge testifies that he did not hear the train approaching, and did not know it was coming until the buggy was struck by the engine and he was knocked unconscious; but he adds the rather remarkable statement that after he was knocked unconscious, and while he was flying through the air between the buggy and the ground, he heard the train go by. Rutledge says, however, that before they reached the crossing he thought he heard a train, but did not know from which direction it was coming, and so remarked to his companion, the deceased; that from the crossing they could at night see east down the track the usual switch lights from a mile to a mile and a half, and when the buggy was struck he and the deceased were looking directly down the track east, the direction from which the train which struck the buggy was approaching, but neither saw nor heard

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the train approaching. This train was running as the second section of passenger train No. 15, on which the deceased had come to Wilson, and, its customary headlight having gotten out of order, left Petersburg without any headlight except an ordinary hand lantern hung on the side of the part of the engine where the usual headlight should have appeared. The train was running at a considerable speed; no lookout ahead of the engine was, or could be, kept under the circumstances. All the witnesses testifying in relation to the matter agree that the grade from Wilson toward the road crossing was an ascending grade—in fact, the maximum grade of the defendant's railway track in that section of the country; and the uncontradicted proof is that an engine pulling the train in question, made up of heavy cars, must of necessity have made quite an exhaust in performing its work; in fact, the engineman's statement that the engine was laboring quite heavily is borne out by the testimony of two of plaintiff's witnesses, that they heard the train blow as it approached Wilson station, and heard the noise of the train as it ran from Wilson toward the crossing at which the accident occurred; that it made "an unusual quantity of fuss," and that they heard the noise the train made as it passed along toward the crossing, although these witnesses (husband and wife) were in bed in their house "four or five hundred yards right straight from the track," and the windows of the house were all down. One of these (plaintiff's) witnesses, Mr. Bishop, was asked, "If that train had blown for the crossing, would you have heard it?" And the witness replied, "Yes, sir, I would have heard it, of course, bound to have heard it. Everything was perfectly quiet." "Was there anything in the world to prevent your hearing it?" A. "Nothing in the world." Other witnesses testify as to the night being quiet and nothing to prevent the hearing of the approaching train as it came to the crossing on an up-grade, and the statement of the witnesses, Mr. and Mrs. Bishop, that when they heard the train sound its whistle it was for Wilson's station but accentuates the proof that the train approaching the crossing



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was bound to have been heard by anyone at or near the crossing, especially by anyone looking and listening for the approach of the train.

We have then in the record as undisputed facts that the deceased and his companion, Rutledge, knew well the surroundings of the road crossing, frequency of passing trains, regular and irregular, both having resided in that neighborhood for a number of years; that the night of the accident was a still night; that no wind was blowing to obstruct sound; that the train was running rapidly up-grade and making more than usual noise; that the whistle of the engine blew as it approached Wilson station, and was heard by persons four or five hundred yards just off from the crossing; and that, by the maps and photographs introduced by both parties, the view from the crossing to the station and beyond was unobstructed. Plaintiff's witness, J. P. Dahlborn, a surveyor and photographer who made one of the maps, testified that the right of way was forty feet on each side of the railroad, and that a man standing in the county road thirty feet from the center of the crossing could see all the way to the station and beyond.

There is no dispute between counsel for the contending parties as to the law defining the reciprocal duties of a traveler on a highway approaching a railroad crossing and of those in charge of a train approaching the same.

Considering first whether or not the court erred in its ruling giving and refusing certain instructions to the jury, we find that the plaintiff asked for and obtained, without objection of the defendant, six instructions; that the defendant asked for four instructions, the first two of which were given, and the third also, with a modification, but the objection of the defendant to the modification is waived in this court.

The defendant's fourth instruction, which was refused, is as follows: "If the jury believe from the evidence that the injury to the plaintiff was caused solely by the failure of the defendant to have the usual and customary headlight on its engine, they

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must find for the defendant, whether such failure was negligent or otherwise.”

This instruction is of very doubtful interpretation, to say the least of it, and was calculated to mislead the jury, rather than to aid them in reaching a correct conclusion; especially is this true since the instructions given clearly expounded the well settled law applicable to the case; therefore, defendant's instruction No. 4 was rightly refused.

In considering the remaining assignment of error, necessary to be considered, which present the question whether or not the verdict of the jury is contrary to the law and the evidence, we leave out of consideration, as the familiar rule governing the consideration of the evidence requires, the testimony of eight or nine witnesses introduced by the defendant, some of the highest standing as to truthfulness and veracity, who reside in the vicinity where this accident occurred, having no connection whatever with the defendant company, or interest in the result of this controversy, who testified that the account of the accident given by the plaintiff's principal witness, Rutledge, at the trial of this case was altogether different from the account he gave of it immediately after its occurrence; his first account admitting that both he and the deceased (Crowe) heard the train coming, and put the blame for the accident on the deceased, saying among other things that “If Crowe had listened to him they would never have had any trouble”; that “they heard a train coming a little while before they got to the crossing, and they stopped in the road.” “Well they (we) stood awhile, a few minutes, and Mr. Crowe was driving. Well, Mr. Crowe says, ‘Well, I reckon we can make it, and I’ll drive on’ ”; that “Mr. Crowe said he thought he had time to make it”; while the account given at the trial, and after the witness had brought and had then pending a suit against the defendant company for \$15,000 damages by reason of injuries he received in the same accident, sought to exonerate himself and the deceased from all blame for the accident, and to show that it was the result of the

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negligence of the defendant alone. The only solace that the witness takes for being thus shown up as occupying a position at the trial wholly inconsistent with the position he took immediately after the accident and for some time after, is, after denying having made the statements imputed to him by the witnesses, he claims on cross-examination that he had no recollection, that his memory was not good, etc.

However, the case turns here upon the question whether or not, upon the physical facts as to the surroundings of the place where the accident occurred, appearing from plaintiff's own evidence, the maps and photographs introduced and used by both parties at the trial, and the uncontradicted evidence given in the case, it can be accepted as true that while the witness, Rutledge, and the deceased, occupants of an open buggy, could and did see the switch lights down in the direction from which the train was coming, a distance of at least one mile, they did not see the lantern swinging beside where the usual and customary headlight of the engine belonged, nor see or hear the train coming on a straight track for the same distance, the view of which and noise it necessarily made being wholly unobstructed, which train was so close at hand that it struck the buggy occupied by the witness and the deceased, which had only moved twenty-five feet, and that, too, notwithstanding the fact that the noise of the train, as we have seen, was so loud and distinct that two of plaintiff's witnesses, Mr. and Mrs. Bishop, in their house about five hundred yards from the railroad, with all the windows of the house down, heard distinctly the noise made by the train as it came from Wilson station past the crossing, the point of this accident, and beyond.

The witnesses on both sides who testified in relation to the matter state that the grade from Wilson toward the crossing was an ascending grade, and the county surveyor, who actually tested the grade with his instruments, stated that it was about the maximum grade of the defendant's railway in that section of the country. It is proven also, and without contradiction, that

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an engine pulling a train of heavy cars, as the train in question was, composed of a baggage car, one ordinary coach and three Pullman sleepers, must of necessity make quite an exhaust in performing its work, especially on an up-grade; and the engineer that ran this train says that the engine was laboring quite heavily, and his statement is not only not contradicted but borne out by plaintiff's witnesses, Mr. and Mrs. Bishop, the latter saying that the train was making more than the usual noise. Now, to accept as true the statement of the witness, Rutledge, upon which the verdict of the jury can alone be sanctioned, that he and his companion, the deceased, although they had both at twenty-five feet from the railroad track and again at the crossing, looked and listened for an approaching train and neither saw nor heard the train coming, although neither the sight nor the noise made by the train was obstructed, would, under the circumstances narrated, be to accept as true that which in the nature of things could not be true.

In such a case, when the fact testified to and the fact necessary to be proven in order to sustain the verdict of a jury could not in the nature of things be true, the authorities clearly hold that the verdict should be regarded as against the evidence, and be set aside.

This court, in *Anderson v. C. & O. Ry. Co.*, 93 Va. 665, 25 S. E. 947, held, that notwithstanding the rule required that the case in the appellate court was to be considered as upon a demurrer to evidence, "that rule, while it may and often does require us to accept as true that which is capable of proof, though the preponderance of evidence be ever so great against it, cannot compel us to accept as true what in the nature of things could not have occurred in the manner and under the circumstances narrated, and may be said, therefore, to be incapable of proof." See also *Harvey's Case*, 103 Va. 850, 49 S. E. 481; *Peters v. So. Ry. Co.*, 135 Ala. 533, 33 South. 332.

In the last-named case the opinion quotes from the opinion in *Artz v. Railroad Co.*, 34 Ia. 154, 159, where, in discussing

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the question we are now considering it is said: "But it is urged by the appellee's counsel that the plaintiff testifies that he did both look and listen to see and hear the train, but did not; and that this testimony shows that he was not guilty of contributory negligence, or that at the very least it made that a question of fact for the jury. The difficulty, however, with the position is that, the conceded or undisputed facts being true, this testimony, cannot, in the very nature of things, be also true. It constitutes, therefore, no conflict. Suppose the fact is conceded that the sun was shining bright and clear at a specified time, and a witness having good eyes should testify at the time he looked he did not see it shine; could this testimony be true? The witness may have been told that it was necessary to prove in the case that he did look and did not see the sun shine. He may have thought of it with the desire that it should have been so. He may have made himself first believe that it was so, and this belief may have ripened into a conviction of its verity, and possibly he may testify to it in the self-consciousness of integrity. But after all, in the very nature of things, it cannot be true, and hence cannot in the law form any basis for a conflict upon which to rest the verdict. A man may possibly think he sees an object which has no existence in fact, but which it may be difficult, if not impossible, to prove did not exist, or was not seen. But an object and power of sight being conceded, the one may not negative the other." *Marland v. Railroad Co.*, 123 Pa. 487, 16 Atl. 747, 10 Am. St. Rep. 541; *Myers v. Railroad Co.*, 150 Pa. 386, 24 Atl. 747; *Payne v. Railroad Co.*, 136 Mo. 562, 38 S. W. 308; *Railroad Co. v. Pounds*, 27 C. C. A. 112, 82 Fed. 217.

In the recent work of Moore on Facts, the author in sec. 160, citing *Hook v. Missouri Pac. R. Co.*, 162 Mo. 569, 63 S. W. 366, says: "Courts are not so deaf to the voice of nature or so blind to the laws of physics that every utterance of a witness in derogation of these laws will be treated as testimony of probative value because of its utterance. A court will treat that

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as unsaid by a witness which in the very nature of things could not be said."

In section 191 the same author says: "A conclusive presumption that a sound was heard by a person is quite often applied in the case of persons at or near a railroad crossing with a train thundering down on them."

The same author, citing a number of authorities, in a note to section 216, says: "Courts take judicial knowledge of the fact that railroad trains create a great deal of noise in their movements and that for some considerable distance such noise can be heard."

Again, the same author, in section 221, citing ample authority to sustain the text says: "*Presumption that train was heard*—It must be conclusively presumed that a pedestrian who stopped and listened within six feet of a railroad crossing could have heard a locomotive, a train which struck him going at the rate of fifteen miles an hour. In such a case his testimony that he did not hear the train was pronounced 'so contrary to the daily experience of common life, so at war with the conceded and indisputable physical facts in the case, that neither courts nor juries can, without stultifying themselves, yield to it an iota of probative force or effect. It is a proposition too monstrously improbable for rational human belief. To argue to the contrary of this is to endeavor the transmutation of the impossible into possibility.' In another case the court said 'It almost seems incredible that a man can be within twenty feet of a railroad and not hear an approaching train, even although no whistle was sounded or bell rung.' Again it was held that a person within one hundred feet of the track, possessed of ordinary hearing, and listening attentively with nothing to obstruct the sound, cannot fail to hear a train approaching at thirty miles an hour."

Elliott on Railroads, in section 1703, citing as authority decisions in several States, under the headline, "Physical Facts," says: "It is an old saying that 'actions speak louder than

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words,' and so there are sometimes physical facts present in a case sufficient in strength to overcome the evidence of witnesses. Well-established laws of nature and similar well-known scientific and physical facts of which the courts will take judicial knowledge may not only justify a trial court in directing a verdict or in setting aside a verdict and granting a new trial, but may also be sufficient to cause the appellate court to reverse the action of the trial court where it fails to give effect to such facts by directing a verdict or granting a new trial. Notwithstanding the general rule, which prevails in most jurisdictions, that the court, on appeal, will not weigh the evidence, neither the appellate court nor the trial court should stultify itself by allowing a verdict to stand, although there may be evidence tending to support it, where the physical facts are such as to demonstrate that such evidence is untrue, and the verdict unjust and unsupported in law and in fact. In a recent case the plaintiff testified that he stopped and looked and listened when about six feet from a railroad crossing and saw no engine, and that as soon as he stepped inside the first rail of the track an engine noiselessly approached and struck him; that his sense of hearing was perfect, and that there was nothing to obstruct sound or prevent him from hearing. There was also undisputed evidence that the engine and tender weighed eighty tons, had fourteen wheels and was running at the rate of at least twenty-five miles an hour. The supreme court held that it was a physical impossibility that the engine could move at that rate without making any noise, and that the plaintiff must have heard it if he looked and listened, as he testified that he did, and the judgment of the trial court on the verdict for the plaintiff was reversed. In another recent case the appellate court said that while it had no power to weigh the evidence, yet where the evidence which appears to be in conflict is nothing more than a mere scintilla, or where it is met by well-known and scientific facts, about which there is no dispute, this court will still exercise jurisdiction to review and reverse. So, where it was



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necessary to assume, in order to support the verdict, that the plaintiff was fully nine feet high, the appellate court reversed the judgment and granted a new trial. In another case a verdict was set aside because the court knew that if the plaintiff had been exercising ordinary care and occupying the position he claimed he was occupying, he could not have been injured in the manner in which the undisputed evidence showed that he was injured. And in many other cases verdicts have been set aside because they could only be supported by assuming or believing something contrary to human experience or to the laws of nature. There are many facts of which courts *ex-officio* take notice, and neither averment nor proof will prevail against matters which are judicially known to the court. The courts will not allow the verdicts of juries to stand when they rest on evidence which the courts judicially know to be incredible. It is of the utmost importance, therefore, in many railroad cases, for the defendant to show the physical facts, and it is equally important to the plaintiff for him to come prepared, not merely to deny what the undisputed physical facts show must have been true, but to show, by some evidence at least, that the physical facts are not as claimed by the defendant or are not such as to conclude the plaintiff in the particular case."

The contention that the failure of the defendant to give the statutory signals and to have the usual and customary headlight on its engine lulled the deceased and Rutledge into the belief that they could safely cross the track ahead of the approaching train, of whose approach they were aware, is neither sustained by the facts in the case nor by the authorities. See *Smith's Adm'r v. N. & W. Ry. Co.*, 107 Va. 725, 60 S. E. 56; *Southern Ry. Co. v. Hansbrough*, 107 Va. 733, 60 S. E. 58.

We are of opinion that the verdict of the jury in this case is plainly against the evidence. Therefore, the judgment of the circuit court will be reversed, the verdict set aside, and the case remanded for a new trial.

*Reversed.*



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Statement.

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**Richmond.**

## NOTTINGHAM AND OTHERS v. ACKISS, ASSIGNEE, AND OTHERS.

March 10, 1910.

Absent, Buchanan, J.

1. DEBT—*When Action of Lies*.—An action of debt will only lie for the recovery of a certain sum of money, due by a certain and express agreement.
2. DECLARATION—*Contingent Liability—Necessary Averments*.—In an action on a contract to pay money when certain designated lots are sold and the purchase money therefor realized, it is necessary to allege in the declaration and to prove not only that the lots have been sold and conveyed, but when the sale and conveyance was made, and that the purchase money therefor has been realized, and when.
3. APPEAL AND ERROR—*Reversal—Leave to Amend Declaration—Effect of Amendment—Case at Bar*.—Where the judgment in an action at law has been reversed by this court and cause remanded, with liberty to the plaintiff to amend his declaration, and he has amended it, it will be presumed that he made, in his amended declaration, the strongest presentation of his case that the facts would permit, and, on a second writ of error calling in question the sufficiency of the declaration as amended, if it is not sufficient this court will render such judgment as the trial court ought to have rendered sustaining the demurrer to the declaration, and will enter up final judgment for the defendant. But under the facts of the case at bar, this judgment will be without prejudice to the right of the plaintiff to file a bill for the specific performance of the contract in suit, or to rescind the same and have the title to the lots mentioned in the contract, or such of them as remain unsold conveyed to him.

Error to a judgment of the Law and Chancery Court of the city of Norfolk. Judgment for the plaintiff. Defendant assigns error.

*Reversed.*

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Opinion.

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The opinion states the case.

*Burroughs & Bro.*, for the plaintiffs in error.

*Wm. McK. Woodhouse*, for the defendant in error.

CARDWELL, J., delivered the opinion of the court.

As the record of this case appeared when before this court on a former occasion (107 Va. 63, 57 S. E. 592), defendant in error, as the assignee of one C. F. Hodgman, brought his action of debt on a negotiable note for \$790, payable, as appeared on its face, on demand and past due, without making any reference whatever in his declaration to a written agreement introduced in evidence at the trial, made and signed by the parties to the transaction at the same time the note was executed by the drawers, the agreement being made a part and parcel of the note, to which it was attached, and set forth that the payee of the note would not demand the payment of the note except and until sale was made of thirteen certain lots of land, or some part or parts thereof, but would "only demand payment of such and all sums as may be realized upon a sale of said lots of land, in whole or in part, as the same may be sold." The note sued on, and the agreement attached thereto, are set out in the opinion of this court at the former hearing of the case and need not be repeated here.

This court then held that the note and the agreement attached thereto, made at the same time, and the latter in terms expressly declaring that it was executed as part and parcel of the note, constituted the contract between the original parties to them, and that they showed upon their face that the contract was not to pay money on demand, but only on certain conditions; and that the defendant in error only acquired such rights by their endorsement and delivery to him as the payee of the note had; therefore, the judgment of the trial court for the full amount

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of the note, \$790, with interest from the date of the note, was reversed, the verdict of the jury set aside, and the cause remanded, with leave to defendant in error, if he should be so advised, to amend his declaration and have a new trial.

When the case went back the declaration was amended, and contains two counts. The first count sets out the note and the agreement as a part of it, and alleges "that the defendants have made sale of and conveyed all and every part of the said lots of land set out and described in said agreement and contract, whereby and whereupon the said writing obligatory or note became and was due and payable." The second count is a count in *assumpsit*, claiming damages by reason of the failure of plaintiffs in error to exercise due diligence in making sale of the lots of land.

There was a demurrer to this amended declaration and to each count thereof, which was sustained as to the second count, but overruled as to the first; and the overruling of the demurrer as to the first count constitutes plaintiffs in error's first assignment of error.

The proposition is too elementary to need citation of authority for its support, that the action of debt will only lie for the recovery of a certain sum of money, due by a certain and express agreement. But if it could be conceded (which it is not) that this rule could be so relaxed, as counsel for defendant in error argues it should be in this case, that what is claimed depended on a contingency and that contingency having happened, the action of debt will lie to recover the sum of money thus becoming due, still the question remains whether or not the first count of this declaration sets out a cause of action entitling to recovery of the amount of the debt sued for.

Contract were not for a sum certain, but payable at an uncertain time, and then a sale of all or a part of the lots of land the purchase money therefor being re-

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alized, are propositions that were settled by the former decision in the case, *supra*. The amended declaration alleges the sale and conveyance of all of the lots, but does not allege when such sale or sales, conveyance or conveyances, were made, nor that the purchase money therefor had been, either in whole or in part, realized. As the right to recover on the contract was conditional—that is, when the whole of the lots or some part or parts thereof were sold, and then only could payment of the note or any part thereof be demanded as the lots were sold and *the purchase money realized therefor*—it was essential to defendant in error's right to recover in this action that he allege in his declaration, not only that the lots had been sold and conveyed, but when the sale and conveyance thereof or any of them were made, and that the purchase money therefor had been realized and when. He, however, did not allege the date when he had the right to demand payment of or on account of the note, nor the date from which the amount he had the right to demand would bear interest; and without these allegations appearing in his declaration he has failed to set out a good cause of action against plaintiffs in error upon the contract, which expressly provided, as we have observed, that demand on the note could only be made for the sum or sums realized upon a sale of the lots of land, in whole or in part, as the same might be sold and the purchase money therefore realized.

We are of opinion that the lower court erred in not sustaining the demurrer to the first count of the amended declaration, as well as to the second; and in view of the fact that the defendant in error filed an amended declaration, in which he restated his cause of action in the light of the opinion of this court when the case was before it, as above stated, and which opinion clearly set forth that the right of recovery on the note was conditional only, and with equal clearness and precision indicated that no cause of action on the note and agreement, which evidenced the contract between the parties thereto, could be maintained unless the conditions upon which payment on the

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contract could be demanded had been fulfilled, it is to be presumed that defendant in error has made in his amended declaration the strongest presentation of his case which the facts permit, and that it could not be bettered if leave were given to again amend; therefore, this court will render the judgment which the trial court ought to have rendered, sustaining the demurrer to the declaration, and enter a final judgment for plaintiffs in error; but this disposition of the case is to be without prejudice to the right of defendant in error to institute such other proceedings as he may be advised, either to have specific performance of the contract he holds with plaintiffs in error concerning the lots of land in question, or to rescind the same and have the title to said lots, or such of them as remain unsold, conveyed to him.

*Reversed.*

**Richmond.**

PETTY, TRUSTEE, v. MOORES BROOK SANITARIUM AND OTHERS.

March 10, 1910.

Absent, Buchanan, J.

1. FRAUD—*Spendthrift Trust—Settlement of Grantor Upon Himself—Exemption From Debts—Discretion of Trustee.*—The owner of property, even though a spendthrift, cannot convey his property to a trustee for his sole benefit for life, with power to dispose of the trust property at his death, and yet exempt the property from the payment of debts he may thereafter contract. The fact that the trustee is invested with discretion to withhold from such grantor all benefits arising under the trust does not alter the case. A spendthrift, as such, has no rights superior to those of other people.

Appeal from a decree of the Corporation Court of the city of Lynchburg. Decree for the complainant. Defendant appeals.

*Affirmed.*

The opinion states the case.

*J. T. Coleman and Leon Goodman*, for the appellant.

*F. C. Moon, and W. C. Carrington*, for the appellees.

HARRISON, J., delivered the opinion of the court.

On the 28th day of August, 1902, Harry S. Langhorne, an improvident young man, created a "spendthrift trust" for his own benefit by conveying a valuable estate possessed by him to a trustee upon the following trusts: To secure his then existing indebtedness and certain debts of his mother. After these debts

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had been satisfied, together with certain costs mentioned, the residue of the property conveyed, or its proceeds, was to be invested by the trustee to the best advantage, paying to the said Langhorne from time to time out of the accruing net interest and profits such sum as the trustee might, in his discretion, deem proper for the maintenance, support and other necessities of the said Langhorne. In this connection, the deed provided that neither the trustee named, nor any succeeding trustee should be compellable to pay to the said Langhorne any part of such interest or profits; provided, however, that if the trustee, or his successor as such, together with George W. Langhorne, father of the grantor, or the trustee acting solely after the death of the father, should judge that the grantor's habits and steadiness were such that it would be prudent to entrust him with the full management of the *corpus* of the property conveyed, or any part thereof, then the trustee was directed to turn over the whole, or such part thereof as might be so deemed prudent, to the grantor. The deed further provided that, in the event of the death of Harry S. Langhorne without the principal or *corpus* of the property being turned over to him, the trustee should pay the same, or such part thereof as might remain in his hands or under his control, together with any accumulated interest or profits, to such person or persons as the said Harry S. Langhorne might by last will and testament appoint; or, in default of such appointment, to the person or persons who would be entitled under the statute of descents and distributions as his heirs and distributees, but without being liable to any debt he might contract. The deed further provided that any successor to the trustee named should be appointed by the Corporation Court of the city of Lynchburg.

The debt asserted in the bill of complaint was contracted by Harry S. Langhorne after the deed of August 28, 1902, was executed and recorded. The decree appealed from annulled and set aside the deed as to this debt, holding that the property conveyed, after the satisfaction of the debts secured by the deed,

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was liable for debts of the grantor contracted since its execution.

The sole question presented by this appeal is whether or not, after the execution of this deed, Harry S. Langhorne had any interest in the property conveyed which could be subjected by a creditor whose debt was contracted after the deed had been executed and recorded.

It is clear from the deed that, notwithstanding the broad and uncontrolled discretion lodged in the trustee, the purpose and expectation was that the grantor would thereafter be permitted to enjoy the benefits of the property thereby conveyed, while at the same time it would be shielded from liability for any future debts that he might contract. In all trusts there must be a *cestui que trust*, and it is manifest from the deed that Harry S. Langhorne was to have the sole beneficial use of the property conveyed, certainly during his life, with power to dispose of what remained at his death by will.

Unless the owner of property can convey it in trust and reserve to himself benefits directly, and at the same time exempt it from liability for his future debts, he cannot do so indirectly by conferring discretion on the trustee to withhold all benefits from him; for if this can be done, the owner need only select as trustee a near kinsman or tried friend on whom he may rely for liberality, and thus indirectly accomplish what he cannot do directly. *Menkin v. Brinkley*, 94 Tenn. 721, 31 S. W. 92; 2 Am. & Eng. Dec. in Eq., 619. The question to determine is therefore whether the owner of property, even though he be a spendthrift, may convey it in trust, he himself being the *cestui que trust*, and exempt it from the payment of debts he may thereafter contract.

The cases and text-writers are innumerable in which judges and authors have discussed with learning and ability the question whether one person can convey property in trust for the benefit of another who is *sui juris*, and so limit and restrict it as to shield it from the debts of the beneficiary. In England,



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from which country we derive the principles of our jurisprudence, the courts have steadfastly adhered to the common law rule that spendthrift trusts were invalid because repugnant to the ordinary rights of property and contrary to public policy. In this country a number of the States of the Union have departed from the English rule and upheld spendthrift trusts where the settlement had been made by one person for the benefit of another, with an exemption from any debts that the beneficiary might create.

In the recent case of *Hutchinson v. Maxwell*, 100 Va. 169, 40 S. E. 655, 93 Am. St. Rep. 944, 57 L. R. A. 384, where the subject of a spendthrift trust created by one person for the benefit of another was involved, Judge Buchanan, speaking for this court in a well considered opinion, says: "The decisions of the American courts upon this question are conflicting, and the reasoning of the courts which upheld spendthrift trusts is unsatisfactory, and, as it seems to us, at war with well settled principles of law as to the incidents of property, whilst the English courts of chancery, and the American courts which follow them, seem to us to be sustained by the better reason, and to be in furtherance of a wise public policy." The views and principles announced in this case are entirely opposed to the proposition here contended for, that a man can convey his property to a trustee in such a way that he can have an estate to live on, but not an estate to pay his debts with.

In the State of Pennsylvania, where the American doctrine of spendthrift trusts had its birth, the right of a person to convey his property to a trustee so that he may enjoy its benefits and exempt it from liability to his debts thereafter contracted, is emphatically denied. In *Mackason's Appeal*, 42 Pa. 330, 82 Am. Dec. 517, the court says: "This statement brings us to the simple inquiry, can the owner of property so dispose of it, for his own use, benefit, and support, as to put it beyond the reach of liability for his future debts, he being and continuing *sui juris*, and there appearing to be no reason therefor except-

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ing to withdraw it from such liability, and thus retain the temporal ownership without its incidents? This would be a startling proposition to affirm. It would revolutionize the credit system entirely, destroy all faith in the apparent ownership of property, and repeal all our statutes and decisions against frauds. Every man about to engage in business where there was a chance of loss, would place himself under the pupillage of trustees, and everybody's estates would be passing under settlement deeds and trustees' accounts through the courts before in the natural order of things the jurisdiction of the orphan's court would attach. Such consequences from judicial action need not be deprecated in advance, for they never can occur."

In *Ghormley v. Smith*, 139 Pa. 584, 21 Atl. 135, 23 Am. St. Rep. 215, 11 L. R. A. 565, the court says: "But, whilst in the recognition of spendthrift trusts we have departed from the English rule, there is no case in Pennsylvania which goes to the extent of recognizing a spendthrift trust, in which the grantor is himself the sole beneficiary for life, with power to dispose of the trust property at death, yet neither the income nor the *corpus* of the estate subject to his debts. The policy of our law is otherwise, and in *Mackason's Appeal* it has been plainly so decided."

In Massachusetts, the decisions of which State have been favorable to spendthrift trusts, the attempt to uphold against creditors trusts like the one under consideration have failed.

In *Bank v. Windram*, 133 Mass. 175, the court says: "The general policy of our law is that creditors shall have the right to resort to all the property of the debtor, except so far as the statutes exempt it from liability for his debts. But this policy does not subject to the debts of the debtor the property of another, and is not defeated when the founder of the trust is a person other than the debtor. . . . But when a man settled his property upon a trust in his own favor, with a clause restraining his power of alienating the income, he undertakes to

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put his own property out of reach of his creditors, while he retains the beneficial use of it. The practical operation of the transaction is that he transfers a portion only of his interest, retaining in himself a beneficial interest, which he attempts by his own act to render inalienable by himself and exempt from liability for his debts. To permit a man thus to attach to a valuable interest in property retained by himself the quality of inalienability and of exemption from his debts seems to us to be going farther than a sound public policy will justify. No authorities are cited in favor of such a rule."

The deed involved in the case of *Menkin v. Brinkley*, 93 Tenn. 721, 31 S. W. 92, *supra*, was very similar to the deed in the present case. The opinion in that case is well considered and the authorities are reviewed at length. After pointing out that under the Tennessee statute the trust subject could be reached by creditors in such a case, the court says: "But in the absence of a statute positively so directing, we could never hold that the owner of property can so convey it as to enjoy the benefits arising from it, and shield it from debts which he may create, even if he be a spendthrift. And we have yet to learn that a spendthrift has rights superior to those of other people. If a spendthrift may do this thing, any other person can; and what would be the condition of society commercially if every man can make his neighbor his trustee to manage his property, so that he may enjoy its benefits, and at the same time protect it from his debts, we will not endeavor to depict. It is a general rule that all property to which a debtor has a right may be subjected to his debts unless the State shall see fit to exempt a portion of it."

In the 26 Am. & Eng. Ency. of Law (2d ed.), p. 147, citing numerous authorities in support of the text, the law is stated as follows: "A donor or settlor cannot, even in jurisdictions where spendthrift trusts are allowed, so dispose of his property for his own use, benefit, or support, as to put it beyond the reach of liability for his future debts. If such donor continues

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*sui juris*, and if there appears to be no reason for such disposition, except to withdraw his property from such liability, he cannot through the medium of a trust thus retain the temporal ownership with the usual incidents.”

Professor Gray, of Harvard University, who has collated all of the authorities and given this subject a most exhaustive consideration, after concluding that a spendthrift trust founded by one person for the benefit of another cannot be sustained upon any sound principle, says: “A clause forbidding alienation being invalid in a settlement upon others, it is *a fortiori* invalid in a settlement upon the settlor himself.” Gray on Restraints Upon Alienation (2d ed.), sec. 268-a.

No case has been cited and we are not aware of one which has carried the doctrine of spendthrift trusts to the extent proposed in this case. A man who enjoys the benefits of wealth, however imprudent and shiftless he may be, should also bear its responsibilities, one of which is liability for his just obligations.

The decree appealed from is right, and it must be affirmed.

*Affirmed.*

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**Richmond.****PERKINS v. HERRING.**

March 10, 1910.

Absent, Buchanan, J.

1. SPECIFIC PERFORMANCE—*Reformation—Mistake—Burden of Proof—Case in Judgment.*—If, on a bill filed for the specific performance of a contract for the sale of land, the defendant sets up the defense of mistake in the contract sued on, and asks that it be reformed before enforcement, the burden is on the defendant to prove the alleged mistake by clear, convincing and satisfactory evidence. If the proof is confused, conflicting, and contradictory, relief will not be granted unless the mistake appears clearly and positively in spite of the conflict, and justice requires correction. In the case in judgment, the evidence of mistake is not such as to warrant relief on that account.

Appeal from a decree of the Circuit Court of Louisa county.  
Decree for defendant. Complainant appeals.

*Reversed.*

The opinion states the case.

*Jas. Lee Shelton and Wm. E. Bibb, for the appellant.*

*F. Wilmer Sims, for the appellee.*

WHITTLE, J., delivered the opinion of the court.

This suit was brought by the appellant to compel specific performance of the following contract:

“Be it know to all men that G. E. Herring of the first part and Otis Perkins of the second part enter into agreement, to-

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wit: G. E. Herring . . . agrees to sell to Otis Perkins the Cherry Hill house tract of land, containing 163 acres, for the sum of \$1,250, and to hold the same until 1st of September, 1907, when Otis will take possession and make the first payment, and Otis Perkins . . . agrees to take the said tract and as evidence of his good faith in this contract he has paid to said G. E. Herring \$50, and will pay \$50 more soon as evidence. Given under our hands and seal this 8th day of November, 1906.

“G. E. HERRING. (Seal.)

“OTIS PERKINS. (Seal.)”

The bill alleges an offer to pay and readiness to pay the residue of the purchase money.

The appellee, Herring, held the land in controversy and an adjoining tract containing 104 acres, in his own right and as executor and trustee under the will of Oscar Herring, deceased, by virtue of two deeds from a special commissioner, dated respectively, September 26, 1887, and March 21, 1891. Both deeds refer to and are based upon the Hart survey and map, which gives the metes and bounds, and shows the relative position of each tract. These lands were formerly owned by Oscar Herring, and were known as the “Cherry Hill” farm. On September 11, 1906, by contract in parol, the appellee agreed to sell the 104 acres of land to T. J. Jones for \$700. The only written memorandum of the latter sale is found in the following receipt:

“Received, September 11, 1906, of Thos. L. Jones fifty dollars on the purchase price of 104 acres of land of the ‘Cherry Hill’ farm. This land lies west of the road leading from R. E. Perkins toward Apple Grove.

“G. E. HERRING.”

The road referred to is known as the “Road to Frederick Hall.”

Herring resisted the demand for specific performance on the ground that at the dates of his contract with Jones and the plain-

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tiff he was laboring under the mistaken impression that the "Road to Frederick Hall" was the true dividing line between the two farms, and that he had contracted with both parties upon that theory, but had since ascertained that 21 8-10 acres of the 163 acre tract lay west of that road. He, therefore, insisted that his agreement with the plaintiff ought to be reformed in accordance with the understanding of the parties, and that Perkins should be put upon terms and required either to accept the portion of the 163 acre tract lying on the east side of the "Road to Frederick Hall," with an abatement *pro tanto* of the purchase price for the deficiency in acreage, or else that his bill should be dismissed.

The plaintiff controverted the defendant's pretension, but the circuit court adopted that theory and decreed accordingly.

In that aspect of the case it will be observed that the defendant is asking reformation of the preliminary agreement for the sale of the 163 acre tract on the ground of a mistake of fact with respect to its western boundary. The burden of proof consequently rests upon the defendant to establish the alleged mistake.

In 34 Cyc. 984, discussing the general doctrine of the weight and sufficiency of evidence to entitle the plaintiff to relief in a suit for the reformation of a written instrument on the ground of mistake, it is said: "The courts are not entirely uniform as to what amount of evidence is sufficient to warrant reformation. In the language of some cases, 'a preponderance of the evidence is all that is required' . . . ; but many cases have held that a mere preponderance of evidence is insufficient. Still other courts require the proof to be established 'beyond a reasonable doubt.' The majority of cases, however, seem to agree on the proposition that the evidence must be clear, convincing and satisfactory."

The majority rule obtains in this jurisdiction. *Carter v. McArtor*, 28 Gratt. 356; *Pulaski Iron Co. v. Palmer*, 89 Va. 384, 16 S. E. 275; *Donaldson v. Levine*, 93 Va. 472, 25 S. E.

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541; *Bibb v. Am. Coal and I. Co.*, 109 Va. 261, 64 S. E. 32; *Percy, &c., Trustees, v. First Nat. Bank of Louisa, Ky.*, ante, p. 129, 65 S. E. 475.

As the result of the foregoing principle we find the following statement of the rule in 34 Cyc. 988: "When the proof is confused, conflicting, and contradictory, relief will not be granted, except the mistake appear clearly and positively in spite of the conflict, and justice requires correction."

It is sufficient to say of the evidence as a whole, that the preponderance is in favor of the appellant, and that the evidence on behalf of the appellee falls far short of the standard required by the authorities. We are also of opinion that the appellee's theory of the case is in conflict with the underlying circumstances attending the transaction, which furnish internal evidence of the fact that his contention is not well founded. He is a farmer of mature age, and had held continuous possession of these farms for many years. The muniments of title (the commissioners' deeds and the Hart survey and map, which were all in his custody) furnish unmistakable information, both of the acreage and metes and bounds of the two tracts. The "Road to Frederick Hall," plainly lettered as such, is clearly defined on the Hart map, and the most casual inspection of that paper shows that the 163 acres lie on both sides of the road.

Besides, the language of the defendant's contract with the plaintiff and his receipt to Jones demonstrate that in their preparation these muniments of title were the source of his information, and that he possessed conscious knowledge of what they contained.

It also appears that if the defendant's contention should prevail it would necessitate a material reformation of both contracts. Jones would take 21 8-10 acres of land more than he either bought or agreed to pay for, while the plaintiff, who admittedly purchased 163 acres, would receive only 141 2-10 acres.



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In short, the entire theory of the appellee is lacking in coherency, and cannot be made to square with the circumstances and documentary evidence. Such a case presents no ground for relief in a court of equity.

For these reasons we are of opinion that the decree of the circuit court must be reversed, and specific performance of the agreement of November 8, 1906, decreed.

*Reversed.*

Statement.

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**Richmond.**

SECURITY LOAN AND TRUST CO. v. FIELDS.

March 10, 1910.

Absent, Buchanan and Whittle, JJ.

1. NOTICE FOR A JUDGMENT—*Must State a Case—Demurrer—Code, Section 3211.*—In a proceeding by motion for a judgment under section 3211 of the Code the notice takes the place of the writ and the declaration in a regular action, and, while the notice is viewed with great indulgence by the courts, it must set out matter sufficient to maintain the action; and whether or not it does this is tested by a demurrer to the notice.
2. NOTICE FOR A JUDGMENT—*Action Against Endorser—Allegation of Presentment and Notice—Demurrer—Bill of Particulars.*—The notice of a motion for a judgment under section 3211 of the Code against the endorser of a negotiable note must contain such allegations of presentment for payment and notice of dishonor to the endorser as will fix a liability upon him for the payment of the note, else the notice will be bad upon demurrer. The defendant is not obliged to call for a bill of particulars in such case.
3. WAIVER—*Implied Waiver—Case at Bar.*—A waiver of legal rights will not be implied except upon clear and unmistakable proof of an intention to waive such rights. In the case at bar the alleged waiver of notice to an endorser was made by one who was not entitled to receive the notice, and who had no authority whatever to make the waiver, even if his conduct could be construed to be such, and hence is not effective.

Error to a judgment of the Law and Chancery Court of the city of Norfolk, in a proceeding by motion for a judgment under section 3211 of the Code. Judgment for the plaintiff. Defendant assigns error.

*Reversed.*

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The opinion states the case.

*Jeffries, Wolcott, Wolcott & Lankford*, for the plaintiff in error.

*John Fields, Jr.*, and *Thos. W. Shelton*, for the defendant in error.

CARDWELL, J., delivered the opinion of the court.

This is a writ of error to a judgment of the Court of Law and Chancery of the city of Norfolk in favor of the defendant in error, the holder of the negotiable note sued on, against the plaintiff in error, the Security Loan and Trust Company, an endorser of the note, the action being by motion upon notice, under section 3311 of the Code.

The notice of motion is as follows: "You are hereby notified that on the 20th day of July, in the year 1908, between the hours of ten (10) and eleven (11) A. M., I shall move the Court of Law and Chancery of the city of Norfolk, Virginia, for a judgment against you for the sum of one thousand dollars (\$1,000.00), with interest thereon from the first day of March, 1907, until paid, the same being due to the undersigned, John Fields, Jr., from you, as evidenced by a certain negotiable promissory note signed by Virginia Medical Co., Inc., by its proper officers, payable to your order and by you endorsed in blank, for the principal sum of \$1,000.00, said note bearing date March 1, 1907, being payable one year after date at the Citizens Bank of Norfolk, Virginia, and bearing interest from the date thereof, at the rate of 6 *per cent. per annum*, the undersigned being the holder in due course, and for value.

"Given under my hand this 26th day of June, in the year 1908.

"JOHN FIELDS, JR.,  
By Counsel."

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The note sued on, with its endorsements, is as follows:

“\$1,000.00 Norfolk, Va., March 1, 1907. .

“One year after date Virginia Medical Co. Inc., promises to pay to the order of Security Loan and Trust Co. one thousand dollars, with interest from date hereof till paid, at six *per centum per annum*, payable semi-annually, at Citizens Bank, Norfolk, Va., without defalcation, for value received. And we, maker and endorser, do hereby waive the benefit of our homestead exemption as to this debt.

“VIRGINIA MEDICAL CO., INC.,

“W. L. Fields, Vice-President.

“Attest:

“A. M. Waddell, Jr., Secretary.”

(Endorsements.)

“Security Loan and Trust Co., Abbott Morris, President.

“With recourse,

“W. L. Fields.”

“Pay to the order of any bank or banker, prior endorsement guaranteed, March 2, 1908, The Nat’l Bank of Goldsboro.

“Goldsboro, N. C.

“C. C. Kornegay.”

“Cashier.”

It will be observed that the action is brought by the holder of the note, claiming to have acquired it in due course and for value, against the first endorser thereof; the endorsement being in blank.

When the case was called for trial on the 5th of February, 1909, plaintiff in error demurred to the notice, in which demurrer defendant in error joined, whereupon the court overruled the demurrer, and this ruling constitutes plaintiff in error’s first assignment of error.

The ground of demurrer was that, in order to entitle defendant in error to recover on the note against plaintiff in error, the note must have been duly presented at maturity and due

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notice of its dishonor given to plaintiff in error; that the note was payable at The Citizens Bank of Norfolk, Virginia, and there is no allegation in the notice that the note was presented to said bank or to any person at any time, or at any place, or that any notice of its dishonor was ever given to plaintiff in error or any person representing it.

While, in proceedings on motion for judgment for money under the statute, *supra*, the notice takes the place of both the writ and the declaration, and is viewed with great indulgence by the courts, this does not relieve the plaintiff of the requirement that he set out in his notice to the defendant matter sufficient to maintain the action, and whether or not he has done this is the sole question raised by the demurrer to the notice. *Morotock Ins. Co. v. Pankey*, 91 Va. 259, 21 S. E. 487; *Union Cent. L. Ins. Co. v. Pollard*, 94 Va. 146, 26 S. E. 421, 64 Am. St. Rep. 715, 36 L. R. A. 271.

Defendant in error relies on the last cited case as supporting his contention that if plaintiff in error desired to have more specific information he had the right to move the court to order defendant in error to file a statement of the particulars of his claim, and failing to do so, he is to be taken as electing to let the notice stand as it was, in order, thereafter, to object to the introduction of the note upon which the motion was made; but in that case a question arose as to the admissibility in evidence of certain foreign statutes, a question not raised by the demurrer to the notice, and what was said in the opinion neither sustains defendant in error's contention, nor militates against the settled doctrine that the notice in such a case must set out sufficient matter to maintain the action.

In this case the action is against an endorser of the note alone, whose liability to the holder, or claimant, of the note was conditional only, as is not questioned; and yet the notice of the motion to be made against him for the amount of the note does not set out a single fact going to show that defendant in error had a right of action against him. As suggested in the

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petition for this writ of error, every word in this notice may be true without any cause of action having arisen against the plaintiff in error as endorser of the note upon which the judgment would be asked.

We are of opinion that the lower court should have sustained the demurrer to the notice, but with leave to defendant in error to amend the notice if he desired to do so. In the event that the case takes that course when remanded, there is a question presented and argued in the record now before us that will necessarily arise at the next trial. Therefore we deem it proper to consider and determine that question upon this record.

The note sued on fell due and became payable on Monday, March 2, 1908 (March 1, 1908, being Sunday), and it is not pretended that it was ever presented for payment at The Citizens Bank of Norfolk, Va., where it was made payable and should have been presented for payment, as shown upon the face of the note, but was only presented for payment to one Abbott Morris, and that, too, on March 5, 1908, three days after the day of the maturity of the note; this presentation being made by a "runner" for the First National Bank of Norfolk, Va., whereupon Morris wrote on the note the words, "The Virginia Medical Co. is indebted to the Security Loan and Trust Co. A. M. return," and handed the note back to the "runner."

The contention of the defendant in error is, in effect, that as Morris was president of both the Virginia Medical Co., the maker, and the Security Loan and Trust Co., the payee and blank endorser of the note, and made answer for both, putting a refusal to pay the note on the ground that the maker thereof was indebted to the endorser already, this is to be taken as a waiver of the release of plaintiff in error from liability by reason of the failure of the holder of the note to present it at maturity to the Citizens Bank of Norfolk.

We are of opinion that there is no merit whatever in this contention. In the first place, it is not pretended that Morris was the person to whom notice of the dishonor of the note should

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have been given, nor that anything was said or done by anybody prior to March 5, 1908, when a "runner" of one of the banks in Norfolk presented to Morris the note in question for payment, which could have been construed as a waiver of the non-liability of the plaintiff in error for the payment of the note. Therefore the waiver must have arisen, if at all, after plaintiff in error's release from liability. And it is also not pretended that Morris had any authority whatever to waive the non-liability of plaintiff in error and re-establish its liability in the manner it is claimed he did, or in any other mode or manner. It is a well recognized doctrine, as applicable to this case as it is to many others, that a waiver of legal rights will not be implied except upon clear and unmistakable proof of an intention to waive such rights.

In *Tardy, Trustee v. Boyd's Admr.*, 26 Gratt. 637, this court said: "Although a promise to pay by an endorser with full knowledge of all the facts and of the *laches* of the holder may be held in point of law to amount to a waiver of the right to notice, yet this rule must be taken with this qualification: The promise to be obligatory must be deliberately made in clear, explicit language, and must amount to an admission of the right of the holder, or of a duty and willingness of the endorser to pay. If, therefore, the conduct or acts of the endorser be equivocal, or the language used be of a qualified or uncertain nature, the endorser will not be held responsible. Story Prom. Notes, 363."

Other questions presented in this record may or may not arise at another trial of the case, if there be one, and therefore we do not deem it necessary to consider them here.

The judgment of the lower court will be reversed, the verdict of the jury set aside, and the cause remanded with leave to defendant in error to amend his notice of motion, if he be so advised.

*Reversed.*

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Syllabus.

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**Richmond,****SOUTHERN RAILWAY CO. v. BAILEY.**

March 10, 1910.

Absent, Buchanan, J.

1. **RAILROADS—Personal Injury—Persons Standing Near Track—Contributory Negligence—Concurrent Negligence.**—A person who stands so close to a railroad track at a station that he is struck by the projecting portions of a passing engine, which could have been seen for a thousand feet before reaching the station, is guilty of such negligence as bars recovery. If it be conceded that the engineer in charge was guilty of negligence, still it was as much the duty of the person injured to care for his own safety as it was of the railroad company to look out for and avoid injuring him, and the mutual and concurring negligence of the parties at the time of the injury would bar a recovery. There can be no recovery when the negligence of both parties is concurrent and operative at the time of the injury, and contributes to it. It is not necessary that the negligence of the plaintiff should have caused the injury in order to bar his recovery. If it contributed proximately to it, he cannot recover.
2. **RAILROADS—Negligence—"Last Clear Chance"—Concurrent Negligence.**—The doctrine of the "last clear chance" applies, notwithstanding the contributory negligence of a plaintiff, where the defendant knows, or by the exercise of ordinary care ought to know, of plaintiff's danger, and it is obvious that he cannot extricate himself from it, and fails to do something which it has power to do to avoid the injury; or when the plaintiff is in some position of danger from a threatened contact with some agency under the control of the defendant, when the plaintiff cannot, and the defendant can, prevent the injury. The plaintiff must show that at some time, in view of the entire situation, including his own negligence, the defendant was thereafter culpably negligent and that such negligence was the latest in succession of causes. In such case the plaintiff's negligence is not the proximate cause of the injury. But this



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doctrine has no application to a case where both parties are equally guilty of an identical duty, the consequences of which continue on the part of both to the moment of the injury, and proximately contribute thereto.

3. RAILROADS—*Negligence—Proximate and Remote Cause.*—Where the negligence of the defendant is the proximate cause of an injury, and that of the plaintiff only the remote cause, the plaintiff may recover, notwithstanding his negligence, as the law regards the immediate and proximate cause which directly produces the injury, and not the remote cause which may have antecedently contributed to it.
4. RAILROADS—*Persons on Track—Negligence of Railroad—Lookout—Proximate Cause.*—If those in charge of a train, in discharge of their duty to keep a lookout, discover, or should have discovered, a person upon the track, and there be superadded any fact or circumstance brought home to their knowledge sufficient to put a reasonable man upon his guard, that the person upon the track pays no heed to his danger, and will take no step to secure his own safety, then the negligence of the person injured becomes the remote cause or mere condition of the accident, and the negligence of the railroad company the proximate cause, and there may be recovery.

Error to a judgment of the Circuit Court of Orange county in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

*Reversed.*

The opinion states the case.

*Williams & Tunstall and Shackelford & Shackelford*, for the plaintiff in error.

*A. T. Browning and E. H. DeJarnette, Jr.*, for the defendant in error.

KEITH, P., delivered the opinion of the court.

A jury found a verdict for the plaintiff upon the defendant's demurrer to the evidence, and the case is before us upon a writ of error.

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Bailey, the plaintiff in the circuit court, was engaged as a drayman in carrying baggage and merchandise of various kinds from and to the station and trains of the Southern Railway, in the town of Orange. There are two tracks upon the Southern road at this point, a track upon which the trains move from the north to the south, known as the southbound track, and a track upon which trains move from the south to the north, known as the northbound track. Upon the latter track, on the occasion in question, there stood a train of the Chesapeake and Ohio railway. Just before receiving the injury Bailey had left his horse and wagon at the rear of the depot on the east side of the railroad tracks, had crossed the track to the west side, heard the Chesapeake and Ohio train coming north, turned and moved toward the south, stopped and was looking at the Chesapeake and Ohio train when he was struck by an engine of the Southern Railway Company on the southbound track, and received the injury for which he sues. He was standing upon a cement walk, which was about on a level with the railroad track, and was struck by some part of the engine. He states that just before his attention was drawn to the Chesapeake and Ohio train he looked toward the north and saw nothing; that he doesn't suppose it was more than a minute after he looked before he sustained the injury and lost consciousness.

The uncontradicted evidence is that from the point at which Bailey was struck there is a clear and unobstructed view to the north for about 1,000 feet, and that for 767 feet of this distance the track is straight. The ordinance of the town of Orange prescribes six miles an hour for the speed of trains within the corporate limits, and the evidence is that on this occasion it was moving at the rate of five or six miles an hour.

Bailey knew that trains were constantly passing upon the track near which he stood. In standing so near the track as to be struck by a passing engine he was plainly guilty of negligence—of negligence which continued up to the moment of the accident. In addition to what has been stated, let it be con-

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ceded that the employees of the railway company operating its train saw the position which Bailey occupied, or by the exercise of reasonable care on their part could have seen him, the question for our determination is whether the jury were warranted in finding a verdict for the plaintiff upon these facts, or whether they present a case of mutual and concurring negligence upon which there can be no recovery.

We have held in numerous cases that those controlling a railroad train approaching a depot or any other point at which it was reasonably to be expected that persons would be in danger, must use reasonable care to avoid doing them an injury. We have held in many cases that an engineer, seeing a person upon the track in the apparent possession of all his faculties, would have a right to suppose that such person would get out of the way of the approaching train; in other words, that to see a man upon the track is not necessarily to see that man in a position of danger, because, if in the possession of his faculties, and in the exercise of that care which is incumbent upon him, he looks out for an approaching train, he can reach in an instant a place of safety, and the peril of one upon the track cannot, therefore, be known to those in control of the train until it becomes apparent that he is unconscious of his danger, or so situated as to be incapable of self-protection, when it becomes the duty of those in charge of the train to do all that they can, consistent with their higher duty to others, to save him from the consequences of his own act. We have held that the duty of guarding an individual against injury, which the law imposes upon a railroad company, is no higher or greater than that which the individual owes to care for his own safety; that all men know that to be upon a railroad track along which trains are frequently moving is to be in a position of danger, and imposes upon the person so exposing himself the obligation to keep a constant lookout for his own protection.

These principles apply with equal, perhaps greater, force to one who takes a position near a railroad track and in such close

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proximity as to be struck by any of the projecting parts of an engine or train—indeed, a person standing near a track would not so readily excite the apprehension of the engineer that his train might do him mischief as if the person stood or moved upon the track and within the rails, and he could also more easily remove himself from his position of peril.

Bailey was standing so near the track that some part of the engine of the southbound train of the Southern Railway Company struck him and inflicted the injury. He was looking toward the Chesapeake and Ohio train, from which passengers were alighting. There was a good deal of bustle and stir around him. The engine in emitting steam added to the noise and confusion; and he relied upon these and perhaps some other like causes to excuse his admitted want of attention, for he expressly says, in answer to the question: “Was there anything to prevent you walking far enough on the sidewalk to be in a place of safety?” A. “I don’t know whether I was or not. I didn’t have just the presence of mind. I wasn’t thinking when I stopped there. I didn’t know that there was anything coming back behind me. I could have walked further out, but I just happened to be walking along there and stopped. My attention drew to the other train, and I happened to stop at that place. I wanted to see if there was any baggage or something of that sort. Consequently I did not get there. I stopped for a minute, and that is all that I remember.” There can be no doubt, therefore, that Bailey was guilty of negligence which continued up to the very moment when he was struck by the train.

In the case of *Southern Ry. Co. v. Bruce*, 97 Va. 92, 33 S. E. 548, this court said: “It is the duty of a railroad company to use reasonable care to avoid injury to a licensee on its track, but it is equally the duty of the licensee to take ordinary precautions for his own safety, even if there be negligence on the part of the company, and if, through his failure to do so, he is injured, he cannot recover. The question is not whether the plaintiff’s negligence caused, but whether it contributed to the

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injury, and if it did so there can be no recovery therefor. In the case at bar the negligence of the plaintiff's intestate contributed to his injury, and there can be no recovery therefor. He walked on the track when there was another safe, suitable, and convenient walkway. He apparently neither looked nor listened for approaching trains, and failed to get off the track, though others near him did so."

In *Norfolk & Western Ry. Co. v. Cromer's Admx.*, 99 Va. 763, 40 S. E. 54, it is said that "it is necessary to the defense of contributory negligence to show that but for it the accident would not have occurred. It is enough to show that the negligence of the plaintiff contributed to the injury. The question to be determined is not whether the plaintiff's negligence caused, but whether it contributed to, the injury of which he complains."

In *Norfolk & Western Ry. Co. v. Wilson*, 90 Va. 263, 18 S. E. 35, it was held that one crossing a railroad at a place where the public is licensed to cross, who knowing that he is on one of the main tracks over which trains pass at all hours, fixes his attention upon a train on the other track which he has changed his course to avoid, and takes no precautions in looking out for trains upon the track on which he is walking, is guilty of such negligence as defeats his recovery for injuries from being struck by such train.

In *Chesapeake & Ohio Ry. Co. v. Rogers*, 100 Va. 324, 41 S. E. 732, it was held to be the duty of a person walking on a railroad track to listen and keep a constant lookout for approaching trains in order to avoid danger to himself, and that the necessity for doing so is not relieved by the negligence, if any, of the railroad company or its servants.

In *Richmond Passenger and Power Co. v. Steger*, 101 Va. 319, 43 S. E. 612, it was held that "there being evidence tending to show that a plaintiff, after going upon a street railway track, did not use ordinary care in getting off before he was struck by an approaching car, which was very near and which he

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had signaled to stop, it was error to instruct the jury to find in his favor, if they believed from the evidence that at the time he got on the track the motorman of the car saw, or could, by the exercise of ordinary care, have seen him in time to stop the car so as to avoid striking him, and failed, in the exercise of such care, to do so." The court said: "There is evidence tending to show that the plaintiff, after he went upon the track, paid no further attention to the approaching car. If he had done so, the defendant's counsel insists, he would have seen that the car was not checking its speed nor going to stop, as he had motioned it to do, and when he saw this he might, by his own movements, have gotten out of the way of the car and saved himself from injury."

"If the continuing negligence of a plaintiff, up to the time of the injury, concurs with the negligence of the defendant in causing the injury, the plaintiff cannot recover." *Consumers' Brewing Co. v. Doyle*, 102 Va. 399, 46 S. E. 390.

In *Southern Ry. Co. v. Forgey*, 105 Va. 599, 54 S. E. 477, the same principle is enforced, the court saying: "Where an injury or loss is caused by the concurrent negligence of both the plaintiff and the defendant, contributing as an efficient cause to the injury complained of, there cannot, as a general rule, be any recovery, as the court will not undertake to balance the negligence of the respective parties in order to ascertain which one was most at fault."

To the same effect see *Humphreys v. Valley R. Co.*, 100 Va. 749, 42 S. E. 882: "If the proximate cause of a plaintiff's injury is his own negligence, concurring with the negligence of the defendant, there can be no recovery." *Richmond Pass. & Power Co. v. Gordon*, 102 Va. 498, 46 S. E. 772.

In Vol. 7 L. R. A. (N. S.), at page 132, there is an instructive note upon the case of *Dyerson v. Union Pacific R. Co.* In that case it was held that a plaintiff who has received an injury occasioned by the negligence of the defendant, but who could have avoided it by the exercise of ordinary care on his own part,

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cannot recover damages therefor, although the defendant ought to have discovered (but did not, in fact, discover) his peril in time to have prevented the accident, where the plaintiff's negligence continued up to the very moment he was hurt, and where the exercise of reasonable diligence before that time would have warned him of his danger and enabled him to escape by his own effort. As is said in the note, "The point upon which the decision in the principal case turns is that the negligence of the plaintiff continued up to the very moment he was hurt, and was therefore contemporaneous and concurrent with the negligence of the defendant."

The author of the note referred to shows that courts in applying the doctrine of the last clear chance have sometimes supported a recovery, although, upon the facts, the plaintiff or the deceased, and not the defendant, would seem, but for his own negligence, to have had the last clear opportunity to avoid the injury. The duty on the part of the defendant's employees to keep a lookout is conceded, but it is shown that there is a corresponding duty upon the part of the deceased to keep a lookout for trains, and if his breach of duty in that respect continues up to the moment of the injury, he cannot recover, for such a case is not one of prior negligence on the part of the deceased and subsequent negligence on the part of the defendant, but of concurring a negligence on the part both up to the very instant of the accident.

We leave out of view, of course, cases where the plaintiff is apparently not in the possession of his faculties, as in the case of *Seaboard R. Co. v. Joyner's Admr.*, 92 Va. 354, 23 S. E. 773; or where, as sometimes happens, the injured person is caught upon a trestle or a bridge, or is otherwise placed in a helpless condition, and those in control of the train had actual knowledge of his condition, or by the exercise of reasonable care should have known of his peril.

We concede the liability of the defendant, also, where the circumstances show that if the defendant had exercised reasonable

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care to discover the plaintiff's peril it could have averted the accident, when it was too late for the plaintiff, by the performance of his duty, to have extricated himself.

This principle is thus stated in *French v. Grand Trunk R. Co.*, 76 Vt. 441, 58 Atl. 722: "It is true that when a traveler has reached a point where he cannot help himself, cannot extricate himself, and vigilance on his part cannot avert the injury, his negligence in reaching that position becomes the condition, and not the proximate cause, of the injury, and will not preclude a recovery; but it is equally true that if a traveler, when he reaches the point of collision, is in a situation to help himself, and, by a vigilant use of his eyes, ears, and physical strength, to extricate himself and avoid injury, his negligence at that point will prevent a recovery, notwithstanding the fact that the trainmen could have stopped the train in season to have avoided injuring him. In such a case the negligence of the plaintiff is concurrent and operative at the time of the accident. When negligence is concurrent and operative at the time of the collision, and contributes to it, there can be no recovery."

In *Robards v. Indianapolis Street R. Co.*, 32 Ind. App. 297, 66 N. E. 66, 67 N. E. 953, the doctrine of the last clear chance is thus stated: "The plaintiff must show that at some point of time, in view of the entire situation, including the plaintiff's negligence, the defendant was thereafter culpably negligent, and its negligence the latest in the succession of causes. In such case the plaintiff's negligence would not be the proximate cause of the injury. . . . The plaintiff not only negligently put himself in a place of peril, but continued negligently to move on to the catastrophe until it happened. The language of the doctrine of prior and subsequent negligence implies that the principle is not applicable when the negligence of the plaintiff and that of the defendant are practically simultaneous."

In *Green v. Los Angeles Ter. R. Co.*, 143 Cal. 31, 76 Pac. 719, 101 Am. St. Rep. 68, the doctrine of the last clear chance was held to apply, notwithstanding the contributory negligence



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of the plaintiff, the court saying: "It applies in cases where the defendant, knowing of plaintiff's danger, and that it is obvious that he cannot extricate himself from it, fails to do something which it is in his power to do to avoid the injury. It has no application, however, to a case where both parties are guilty of concurrent acts of negligence, each of which, at the very time when the accident occurs, contributes to it."

And in *O'Brien v. McGlinchy*, 68 Maine 552, the court says, speaking of the doctrine of the last clear chance: "This rule applies usually in cases where the plaintiff, or his property, is in some position of danger from a threatened contact with some agency under the control of the defendant, when the plaintiff cannot, and the defendant can, prevent an injury. . . . But this principle would not govern where both parties are contemporaneously and actively in fault, and by their mutual carelessness an injury ensues to one or both of them."

In *Smith v. Norfolk & Southern R. Co.*, 114 N. C. 728, 19 S. E. 863, 25 L. R. A. 287, the rule is thus stated: "Applying the rule which we have stated to accidents upon railroad tracks, it may be illustrated as follows: First, there must be a duty imposed upon the engineer, as otherwise there can be no negligence to which the negligence of the injured party is to contribute. The duty under consideration is to keep a vigilant lookout . . . in order to discover and avoid injury to persons who may be on the track, and who are apparently in unconscious or helpless peril. When such a person is on the track and the engineer fails to discover him in time to avoid a collision, when he should have done so by the exercise of ordinary care, the engineer is guilty of negligence. The decisive negligence of the engineer is when he has reached that point when no effort on his part can avert the collision. Hence, if A, being on the track and after this decisive negligence, fails to look and listen, and is in consequence run over and injured, his negligence is not concurrent merely, but really subsequent, to that of the engineer, and he cannot recover, as he, and not the engineer, has the last clear opportunity of

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avoiding the accident. If, however, A is on the track, . . . and while there, and before the decisive negligence of the engineer, he by his own negligence becomes so entangled in the rails that he cannot extricate himself in time to avoid the collision, and his helpless condition could have been discovered had the engineer exercised ordinary care, then the negligence of A would be previous to that of the engineer, and the engineer's negligence would be the proximate cause, he, and not A, having the last clear opportunity of avoiding the injury. The same result would follow in the case of a wagon negligently stalled, when no effort of the owner could remove it; and there are other cases to which the principle is applicable."

We are dealing here with a case where a plaintiff, who could, up to the moment of impact, have placed himself in a position of safety, if he had exercised ordinary care to discover the approaching train, is seeking to recover from the defendant company because, by the exercise of like care, it could have avoided inflicting the injury of which he complains; and the question is whether or not a plaintiff can recover of a defendant where they are equally guilty of the breach of an identical duty, the consequences of which continue on the part of both to the moment of the injury. Of course, before the doctrine of the last clear chance can be invoked, it must be shown that the defendant has been guilty of negligence, either before or after the discovery of the peril constituting the proximate cause of the accident.

In *Norfolk & Western Ry. Co. v. Dean's Admr.*, 107 Va. 505, 59 S. E. 389, this doctrine was applied, and it was held that where the presence of a person upon the track is observed by careful and experienced men operating the train, and they, in the exercise of their best discretion, do not regard him in danger, until, on getting nearer to him, he appears to be unconscious of his peril, and they then do all in their power to prevent an injury to him, though without avail, the company is not liable.

The controlling principles of the cases from this court and elsewhere are well stated in the case of *Richmond Traction Co.*

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v. *Martin's Admr.*, 102 Va. 209, 45 S. E. 886, where the court said: "Two theories were propounded by the evidence: (1) That at the time Martin attempted to cross the northern track of the defendant's railway the car in question was at a standstill, and was subsequently set in motion, and the collision occurred; and (2) that while the car was already in motion Martin stepped on the track immediately in front of it, and was struck by the fender." The court having granted an instruction upon the first theory, which was that of the plaintiff, was asked by the defendant to tell the jury that if they believed from the evidence "that the plaintiff's decedent, on the evening when he met the accident that resulted in his death, was intoxicated from drink, and that, being so intoxicated, he attempted to cross defendant's railway track in front of a moving car that was approaching him, so close to said car that he could not move beyond the point of the track that he first reached before the car struck him, then they are instructed that the plaintiff cannot recover in this action," to which the court added: "Unless they believe further from the evidence that the defendant, by the exercise of ordinary care, could have avoided inflicting on him the injury which resulted in his death, after the motorman saw, or by the exercise of ordinary care could have seen, the danger in which the plaintiff's decedent had placed himself in time to have avoided the accident." The court held that this addition to the instruction was, under the circumstances of the case, erroneous; that "the well-known rule in this class of cases is that a plaintiff seeking to recover damages for an injury caused by the negligence of the defendant must himself be free from negligence, and, if it appears that his negligence has contributed as an efficient cause to the injury of which he complains, the court will not undertake to balance the negligence of the respective parties for the purpose of determining which was most at fault. The law recognizes no gradations of fault in such case, and where both parties have been guilty of negligence, as a general rule, there can be no recovery. There is really no distinction

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between negligence in the plaintiff and negligence in the defendant, except that the negligence of the former is called contributory negligence.

The general rule adverted to is subject, however, to the qualification that where the negligence of the defendant is the proximate cause of the injury, and that of the plaintiff only the remote cause, the plaintiff may recover, notwithstanding his negligence; the doctrine in that respect being that the law regards the immediate or proximate cause which directly produces the injury, and not the remote cause which may have antecedently contributed to it. From that principle arises the well-established exception to the general rule that if, after the defendant knew, or, in the exercise of ordinary care, ought to have known, of the negligence of the plaintiff, it could have avoided the accident, but failed to do so, the plaintiff can recover. In such case the subsequent negligence of the defendant in failing to exercise ordinary care to avoid injuring the plaintiff becomes the immediate or proximate and efficient cause of the accident, which intervenes between the accident and the more remote negligence of the plaintiff.

“It was this principle that was invoked by the plaintiff upon the first theory of the case, and applied by the court in plaintiff’s instruction and in the modified instruction of the defendant. But the second theory presented a case where the proximate and efficient cause of the accident involved the concurrent negligence of both plaintiff and defendant, unbroken by any efficient supervening cause, and to such case the exception referred to obviously has no application. Upon that theory the act of Martin and the conduct of the motorman were so substantially concurrent that it was impossible to separate the conduct of the former from the injury itself. The doctrine under discussion is fundamental and elementary, and has been expounded time and again by this and other courts, from *Davis v. Mann*, 10 Mees & W. 545, decided in the year 1842, down to the present time.” See, also, *C. & O. Ry. Co. v. Corbin’s Admr.*, ante, p. 700, 67 S. E. 179.

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If it be the duty of a person upon the track of a railway to keep a constant lookout for approaching trains (and of this there can be no question), and if it be the duty of the servants of the company in control of the train to exercise reasonable care to discover the presence of a person upon the track, and if in the exercise of such reasonable care the presence of such person would be discovered, and the person on the track is injured and there be no other fact proved, then it is apparent that the case stated would be one of mutual and concurring negligence, and there can be no recovery. The duty was equal and each is equally guilty of its breach. If, however, it appears that those in control of a train, in the discharge of their admitted duty to keep a reasonable outlook, discover, or should have discovered, a person upon the track, and there be superadded any fact or circumstance brought home to their knowledge, sufficient to put a reasonable man upon his guard, that the person upon the track pays no heed to his danger and will take no step to secure his own safety, then the situation changes and the negligence of the person injured becomes the remote cause or mere condition of the accident, and the negligence of the railroad company the proximate cause, and there may be a recovery.

For these reasons the judgment of the circuit court must be reversed, and this court will enter such judgment as that court should have entered.

*Reversed.*

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**Syllabus.**

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**Richmond.****SOUTHERN RAILWAY CO. v. LEWIS.**

March 10, 1910.

Absent, Buchanan and Whittle, JJ.

1. **MASTER AND SERVANT—*Safe Place—Ordinary Care to Provide—Usage as Standard of Care.***—It is the duty of the master to use ordinary care to provide his servant a reasonably safe place in which to work. The duty is not absolute. He is not required to provide, but to use ordinary care to provide; and whether or not such care has been used is to be determined by the general usages of the business. The jury are not to be turned loose to fix a standard of care of their own, and thereby to dictate the customs and usages of business, but to determine whether the conduct of the master conforms to such custom and usage. If it does, the master is not negligent. He is responsible for the consequences of negligence, but not of mere danger.
2. **RAILROADS—*Safe Place—Location of Switch Light—Usage of Railroads.***—Where it is sought to hold a railroad company liable for an injury inflicted on a brakeman by being struck by a switch light on a railroad yard, it is error to instruct the jury to find for the plaintiff if they believe that the injury resulted from placing the switch light in too close proximity to the track. This leaves the jury to determine, from their own judgment, what constitutes "in too close proximity," whereas the question is one of ordinary care on the part of the company in view of custom and usage of the business.
3. **MASTER AND SERVANT—*Safe Appliances—Test of Negligence—Usage.*** The master is not obliged to furnish his servant with absolutely safe appliances, but to use ordinary care to furnish those that are reasonably safe, and among the latter class he has the right of selection. He is not an insurer of the safety of the servant. The unbending test of negligence in the selection of appliances is the ordinary usage of the business.
4. **RAILROADS—*Switch Stand—"Standard" Switch Stand—Inspections—Harmless Error.***—In an action to recover for a personal injury inflicted by coming in contact with a switch stand, where a

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witness testified that the stand was made by a designated manufacturer with their "standard" length rods, and was such as was used by the defendant and other railroad companies, an instruction which spoke of the stand as a "standard" switch stand was not prejudicial to the plaintiff.

Error to a judgment of the Corporation Court of the city of Danville in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

*Reversed.*

The opinion states the case.

*William Leigh*, for the plaintiff in error.

*Peatross & Harris* and *B. H. Custer*, for the defendant in error.

HARRISON, J., delivered the opinion of the court.

This action was brought by W. T. Lewis to recover damages for injuries sustained by him, which he alleges were occasioned by the negligence of the Southern Railway Company. There was a verdict and judgment in favor of the plaintiff, which this writ of error brings under review.

It appears that the plaintiff was, at the time of this accident, in the employment of the defendant company as brakeman on in the employment of the defendant company as brakeman on its yards at Danville. The crew with which he was working, consisting of an engineer, conductor, another brakeman and himself, were engaged in shifting cars. As one of the cars passed the plaintiff he caught the grab-iron on the side of the car to pull himself up, but before this was accomplished he was, according to his statement, struck on the back or near the side by the switch target, which is the lamp on the switch pole, and knocked off, thereby sustaining the injury complained of. No one saw the accident, and it is by no means clear how it happened. The theory of the defendant is that it resulted from a lack of care on the plaintiff's part. It is not alleged that the train was im-

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properly operated, or that the car on which the plaintiff was riding was out of repair or of an improper width, or that the switch was out of repair. The sole negligence charged is that the defendant company placed and maintained the switch, which it is alleged struck the plaintiff, too close to its track, and that the switch was too high. The evidence shows that the appliance in question was a "Ramapo" switch stand, that was in common use by the defendant and other railroads in their yards; that it was placed seven feet from the center of the track, which was the distance that all such switches were placed from the track by the defendant and other railroads, leaving a space of two feet between the lamp and the side of the car, which gave a safe and proper clearance for passing trains; that the switch in question was four feet and one inch high, including the lamp or target on top, and that this was the height of all such switches used on yards by the defendant and other railroads. Not only is the switch stand in question shown to be one of a class in common use by the defendant and other roads, and situated at a distance from the track commonly adopted by the defendant and other roads, but it appears that the point of its location was where the greatest amount of work was done on the yards, and that it had been in that location for two years or more without complaint or accident to anyone.

Instruction No. 1, given for the plaintiff, tells the jury that it was the duty of the defendant to furnish the plaintiff a reasonably safe place for the performance of his duties. This is true, but as a statement of the law applicable to this case it is only partially true. It leaves out of view altogether the further, important limitation upon the master's duty, that he is only bound to exercise ordinary care for the safety of his servant. The instruction as given is well calculated to mislead the jury by conveying to their minds the idea that an absolute duty rested upon the master to furnish a reasonably safe place, whereas his duty was discharged when he had exercised ordinary care to furnish a reasonably safe place.



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Ordinary care is to be determined by the general usages of the business, but the instruction, as given, leaves the jury without guide to decide what is a reasonably safe place, with no regard to the degree of care that may have been exercised in its selection. *Bertha Zinc Co. v. Martin*, 93 Va. 791, 22 S. E. 869, 70 L. R. A. 990; *N. & W. Ry. Co. v. Cromer*, 99 Va. 763, 40 S. E. 54; *Norfolk Traction Co. v. Ellington*, 108 Va. 245, 61 S. E. 779.

Again, in the latter part of this instruction, the jury are told that if they believe from the evidence that the plaintiff sustained his injuries while using reasonable care in the performance of his duties, and that his injuries resulted from the fact that the switch stand and lamp thereon were placed in too close proximity to the railroad track, they must find for the plaintiff. This leaves the jury to determine what was "in too close proximity." They are not told that if the switch stand and lamp thereon was negligently placed too near, or from lack of ordinary care was placed in too close proximity, or that if they believed it was placed nearer than was usual and customary with the defendant and other railroad companies, the defendant was liable; but they are left to fix their own standard as to how close a switch should be placed to a railroad track. This was error. Juries must determine the responsibility of individual conduct, but they cannot be left, without guide, to fix a standard which, in effect, dictates the customs and usages of business. There can be no liability upon the master unless he is shown to have been negligent. He is responsible for the consequences, not of danger, but of negligence. This fundamental pre-requisite to any liability is ignored throughout the instruction under consideration, and the defendant is practically made an insurer of its employees, notwithstanding the established fact that it has conducted its business in a manner shown by long experience to be reasonably safe, and has conducted it as others, governed by their experience, have conducted a like business.

Instruction No. 4, asked for by the defendant, and refused,

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was as follows: "The court instructs the jury that ordinary care is such care as reasonably prudent men exercise in the conduct of a like business, and if they believe from the evidence that the switch stand at which the plaintiff was injured was a standard switch stand in common use by the defendant company and by other railway companies, that it was placed no nearer the track of the defendant company than is usual and customary with said defendant company and other railroad companies, that said switch stand was in good order, and the car upon which plaintiff was riding was of the ordinary and usual width of cars used by said defendant company and other companies, and in good order, then they must find for the defendant."

This instruction was well warranted under the pleadings and evidence in this case, and should have been given. It tells the jury that if the defendant had adopted and furnished a switch stand of the character usually used by itself and others in like business, and placed it according to the ordinary usages and practice of the business, it was not liable. As already pointed out, the law only imposes upon the master the duty of using ordinary care to provide the servant with reasonably safe and suitable appliances and instrumentalities for the work to be done. The right of selection among reasonably adequate and safe methods rests with the master. He is not required to furnish the servant with the newest and best appliances. He performs his duty when he furnishes those of ordinary character and reasonable safety, and the former is the test of the latter; for in regard to the style of the implement or nature of the mode of performance of any work, "reasonably safe" means, safe according to the usages, habits and ordinary risks of the business. Absolute safety is unattainable, and employers are not insurers. They are liable for the consequences, not of danger, but of negligence; and the unbending test of negligence in methods, machinery and appliances is the ordinary usage of the business. These principles have been reiterated by this court through a

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long line of decisions. *Bertha Zinc Co. v. Martin, supra*; *Norfolk Traction Co. v. Ellington, supra*.

Objection is made to this instruction that it uses the term "standard" switch stand. The witness, in speaking of this appliance, says: "These switches are made by the Ramapo people with their standard length rods, and those same length rods are used on other roads." It is not perceived how the use of the term "standard" in speaking of the switch could possibly have prejudiced the plaintiff; it would seem to have rather exalted the measure of duty required of the defendant. The use of the term, however, was unnecessary and on another trial it can be omitted from the instruction.

Objection is made to the action of the court in giving and refusing other instructions. Consideration of these objections would involve an unnecessary repetition of what has been already said. On another trial, if the evidence be the same, the instructions given can be made to conform to the principles herein announced.

The judgment complained of must be reversed, the verdict of the jury set aside, and a new trial granted, to be had not in conflict with the views expressed in this opinion.

*Reversed.*

Statement.

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**Richmond.**

TEMPLETON'S ADMINISTRATOR v. LYNCHBURG TRACTION AND  
LIGHT CO.

March 10, 1910.

Absent, Buchanan and Whittle, JJ.

1. CONTRIBUTORY NEGLIGENCE—*Case at Bar—Electricity.*—The evidence in the case at bar shows that the plaintiff's intestate came to his death solely as the result of his own imprudence and lack of caution. He had been repeatedly warned of the dangers of the work in which he was engaged, and only a short time before his death he was warned of his close proximity to a heavily charged electric wire, and that if he straightened up he would come into contact with it and be killed, and yet in about a minute he raised up, came in contact with the wire and was instantly killed. Under such circumstances there can be no recovery against the company owning the wire. The law does not weigh or apportion the concurring negligence of a plaintiff and defendant, and even if a defendant has been negligent there can be no recovery by a plaintiff who has also been guilty of negligence proximately contributing to his injury.

Error to a judgment of the Circuit Court of the city of Lynchburg in an action of trespass on the case. Judgment for the defendant. Plaintiff assigns error.

*Affirmed.*

The opinion states the case.

*William Beasley*, for the plaintiff in error.

*Coleman, Easley & Coleman*, for the defendant in error.

HARRISON, J., delivered the opinion of the court.

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This action was brought by the administrator of Charles R. Templeton to recover of the Lynchburg Traction and Light Company damages for its alleged negligence in causing the death of the plaintiff's intestate. There was a demurrer to the plaintiff's evidence, which was sustained, and judgment given for the defendant. This judgment we are asked to review and reverse.

Upon consideration of the evidence it is difficult to see wherein the defendant company has been guilty of any negligence that was proximately the cause of the injury which resulted in the death of the plaintiff's intestate. If, however, the negligence of the defendant company was established, it would be under no liability to the plaintiff because his intestate is shown to have been guilty of such contributory negligence as to preclude all right of recovery by him.

The law will not weigh or apportion the concurring negligence of a plaintiff and defendant. There can be no recovery by a plaintiff who has been guilty of contributory negligence. *Clinchfield Coal Co. v. Wheeler*, 108 Va. 448, 62 S. E. 269.

At the time of his death the plaintiff's intestate was working for the Bell Telephone Company; his business being to locate and remedy contacts between the wires of his employer and those of other companies, to disengage, disentangle and separate such wires, etc. He had been for sometime engaged in this character of work all over the city of Lynchburg, and it abundantly appears that he was thoroughly acquainted with the great danger to which he was constantly exposed, and fully advised of the necessity for constant care and vigilance on his part to avoid coming in contact with the wires about which he worked. On the day of the accident the gang of linemen of which deceased was a member assembled for the purpose of taking down an old cable of the telephone company. This cable was in the vicinity of other wires, the highest of which was the heavily charged wire of the defendant traction company. In addition to his general knowledge of the danger, the deceased was specially warned of the hazardous character of the work he was doing when he lost

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his life. As the deceased and others were about to ascend the poles the foreman told them of the unusual danger, and that they must look out for the 2,300 volt wires under them and the 13,000 volt wires above them, and not to touch either, that they would be killed if they did. At the time of the accident the deceased was bending over tying a "traveling block" to the cross-arm of the telephone company's pole, and while thus engaged a fellow workman, who was on another pole near him, noticing that deceased was dangerously near the 13,000 volt wire, called out to him, saying: "Look out, there, if you straighten up and touch them wires you will be a goner." The witness says that when this warning was given the deceased looked at him and smiled, and turned his head around and looked up at the wires to which he had referred; that he thought surely he was not going to straighten up then. In about a minute after this last warning was given the deceased raised up and came in contact with the 13,000 volt wire of the defendant company and immediately fell lifeless to the ground. The evidence shows that the wires were far enough apart for the work in hand to have been done with safety by the exercise of reasonable care, and that deceased lost his life solely as a result of his own imprudence and lack of caution.

There can be no recovery in such a case, and the judgment must be affirmed.

*Affirmed.*

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**Richmond.**

**WASHINGTON, ALEXANDRIA AND MOUNT VERNON RAILWAY Co.  
v. TRIMYER.**

March 10, 1910.

Absent, Buchanan, J.

1. **STREET RAILWAYS—*Failure to Stop—Evidence of Prior Similar Failures.***—Evidence that an electric car did not stop, as it should have done, at a given point on other occasions prior to the accident under investigation, is admissible as tending to show a failure to stop on the occasion when the accident occurred.
2. **STREET RAILWAYS—*Grade Crossing—Collision—Contract Between Companies as Evidence.***—In an action by a passenger against a street railway company to recover damages for a personal injury inflicted in consequence of the alleged negligence of the defendant in coming into collision with an engine on a steam railroad, the contract between the two companies regulating the terms of crossing is not admissible in evidence to establish the degree of care which the carrier owed to its passenger, as that is fixed by law, but that part of it which regulates the terms of crossing is admissible to show that the negligence of the steam railroad company was the proximate cause and that of the carrier, if any, was only the remote cause of the injury complained of.
3. **EVIDENCE—*Admissibility—General Objection.***—A general objection to evidence should be overruled if the evidence is admissible for any purpose.
4. **EVIDENCE—*Partly Inadmissible—Instructions to Jury—Verdict.***—If a court permits an entire contract to be read to the jury, only parts of which are admissible in evidence, but instructs them that they are only to consider certain designated portions thereof, which are the admissible portions, it will be presumed that the jury obeyed the instructions of the court, and, in the absence of any evidence of prejudice to the rights of the parties in consequence of permitting the entire contract to be read to the jury, the verdict will not be set aside on that account.
5. **STREET RAILWAYS—*Grade Crossings—Code, Section 1294-d (51) Not***

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*Applicable.*—Section 1294-d (51) of the Code (1904) requiring railroad trains to stop at least fifty feet before getting to a grade crossing does not apply to street railways.

6. **STREET RAILWAYS—Grade Crossing—Negligence Per Se—Question for Jury.**—It was error, in the case at bar, to instruct the jury that it was negligence as a matter of law for the street railway company to fail to stop its car at least twenty feet before getting to a grade crossing of a steam railroad. It was the duty of the street railway company to use the utmost care and diligence of a cautious person for the protection of its passengers, but it was for the jury to say whether or not, under all the circumstances of the case, it had fulfilled the measure of its duty.
7. **STREET RAILWAYS—Grade Crossings—Care Required.**—A street railway company, as a carrier of persons, owes to its passengers a higher degree of care, upon approaching a grade crossing of a railroad than is required of a person, for his own protection, when driving an ordinary vehicle under like conditions. The latter must exercise ordinary care for his own protection, while the street railway company is liable for the slightest negligence on its part, and is bound to use the utmost care and diligence of a cautious person to protect its passengers from injury.
8. **STREET RAILWAYS—Grade Crossing—Joint Negligence—Carriers.**—A street car company which has negligently run one of its cars upon a grade crossing of a steam railroad cannot escape liability for a resulting injury to one of its passengers by showing that the steam railroad company was also negligent in causing the collision.

Error to a judgment of the Circuit Court of the city of Alexandria in an action of trespass on the case. Judgment for the plaintiff. Defendant assigns error.

*Reversed.*

The opinion states the case.

*Moore, Barbour & Keith* and *Jas. R. & H. B. Caton*, for the plaintiff in error.

*C. E. Nichol*, for the defendant in error.

KERR, P., delivered the opinion of the court.



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John H. Trimyer recovered a judgment against the Washington, Alexandria and Mt. Vernon Railway Company in the Circuit Court of the city of Alexandria, to which a writ of error was awarded.

The injury for which this suit was brought occurred at a point where the tracks of the Washington, Alexandria and Mt. Vernon Railway Company crossed that of the Washington-Southern steam railway, at the intersection of Henry and Cameron streets, in the city of Alexandria; and the object of the testimony offered by the plaintiff and admitted over the objection of the defendant, as set out in bills of exceptions Nos. 1 and 2, was to prove that the accident resulted from the failure of the Washington, Alexandria and Mt. Vernon Railway Company to stop its train at this intersection, as it is alleged it was its duty to do; and, as tending to prove that, on the occasion when the accident occurred it did not halt its train, it was sought to introduce evidence that on other occasions prior thereto it had not done so.

In the case of *Brighthope Railway Co. v. Rogers*, 76 Va., at p. 448, testimony was admitted tending to show that the defendant's locomotive, on occasions other than that for which the action was brought, had emitted sparks and communicated fire to the property along its track and right of way. The court considered that this evidence was relevant and proper for the purpose of showing negligence on the part of the defendant's employees, or defects in the construction of its engine.

In the case of *Grand Trunk Ry. Co. v. Richardson*, 91 U. S. 454, 23 L. Ed. 356, the Supreme Court was of opinion that evidence was properly received to show that fire had been communicated by sparks at other times and from other locomotives, in order to show a negligent habit on the part of the railway company's officers and agents. Said Mr. Justice Strong: "It is, of course, indirect evidence, if it be evidence at all. In this case it was proved that engines run by the defendant had crossed the bridge not long before it took fire. The particular engines were not identified; but their crossing raised at least some prob-

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ability, in the absence of proof of any other known cause, that they caused the fire; and it seems to us, that under the circumstances, this probability was strengthened by the fact that some engines of the same defendant, at other times during the same season, had scattered fire during their passage.”

In *A. & F. Ry. Co. v. Herndon*, 87 Va. 193, 12 S. E. 289, this court affirmed a judgment in which evidence had been admitted tending to show that, prior to the accident there being investigated, it was customary for the defendant to stop its trains on arriving at a particular point.

The assignment of error based upon the first and second bills of exception is overruled, and so far as it rests upon the third and fourth bills of exception it was withdrawn by counsel for plaintiff in error in open court.

The second assignment of error is to the action of the court in admitting in evidence the contract between the Washington, Alexandria and Mt. Vernon Ry. Co. and the Washington-Southern Ry. Co.

While the court permitted the entire contract to be read to the jury, they were instructed to disregard all of it except the following paragraph:

“The said party of the first part hereby further agrees, for the consideration aforesaid, that whenever any of its cars propelled by electricity shall approach such crossing it shall be stopped at a distance of at least twenty feet from the railway track of the said parties of the second part in Henry street; and that the conductor of such car shall go forward to such crossing and ascertain whether or not any train, engine, car or other vehicle is approaching upon the railway of the parties of the second part; and that such car shall not cross over the railway of the parties of the second part until after the conductor shall have ascertained that no train, engine, car or other vehicle is approaching upon the railway of the parties of the second part, and shall have given the man in charge of the motor a signal to cross.”

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We do not think the contract was admissible as establishing the degree of care which the railway company owed to its passengers. That is fixed by law, which holds the defendant railway company responsible for the slightest negligence resulting in an injury to a passenger, and imposes upon it the utmost care and diligence of cautious persons to prevent such injury. *Farish v. Reigle*, 11 Gratt. 697, 62 Am. Dec. 666. We think it evident that such a contract cannot control the responsibility imposed by law, if relied upon by the carrier in diminution of its liability. Clearly the answer would be that its responsibility was to be measured by the law of the land and not by contracts to which the injured party was a stranger. Indeed, if such a contract tended to relieve the defendant of the consequence of its negligence, it would be repugnant to section 1294-c, clause 25, of the Code. See *N. & W. Ry. Co. v. Tanner*, 100 Va. 379, 41 S. E. 721.

There is another aspect, however, in which that portion of the contract which the court allowed the jury to consider would be admissible. The railway company rested its defense, in part, upon the suggestion that the negligence of the steam railway company was the proximate cause, and its negligence, if any, was the remote cause of the accident. It was, therefore, proper to introduce the contract between the plaintiff in error and the companies operating the steam railways, to show their relative duties to each other. If the defendant had requested the court to limit the effect of the contract, as we have indicated, it should have been done; but as the objection to its introduction was general, and as it was admissible for the purpose indicated, the exception taken to the action of the court must be overruled. *Hardy v. Comth.*, *post*, p. 910, 67 S. E. 522, decided at the present term.

The third assignment of error is to the refusal of the court to discharge the jury from the further consideration of the case, because the entire contract just considered had been read in the presence of the jury.

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It is not clear why the court permitted the entire contract to be read to the jury when it was of opinion that only a particular clause should be considered by them, but it cautioned the jury that only a particular part should be considered, and it is to be presumed that the jury obeyed a direction which it was plainly within the province of the court to give; and nothing appearing to show that the reading of the entire contract operated injuriously to the rights of plaintiff in error, this assignment is overruled.

The fourth assignment of error is to the granting of the third and fifth instructions prayed for by the plaintiff.

The third instruction is as follows: "The court instructs the jury that if they believe from the evidence that on the night of the collision between an electric train of the Washington, Alexandria and Mount Vernon Railway and a light engine of the Southern Railway at the intersection of Cameron and Henry streets in Alexandria city, Va., the defendant, the said Washington, Alexandria and Mount Vernon Railway Company failed to bring its said colliding train to a full stop at least twenty feet before getting to the said crossing of the said Southern railroad and the said Washington, Alexandria and Mount Vernon railway, at the intersection of said Henry and Cameron streets, then in that event the said defendant, the Washington, Alexandria and Mount Vernon Railway Company is presumed to be guilty of negligence, provided the jury further believe from the evidence that at such crossing there are no derailing switches or other safety appliances which prevent collision at said crossing, nor at the hour of said collision no flagman or watchman was stationed at said crossing, and that no signal tower was located at said crossing and signaled that said train might cross in safety."

In *Norfolk & Portsmouth Traction Co. v. Ellington*, 108 Va. 245, 61 S. E. 779, it was held that section 162 of the Constitution of the State, and section 1294-k of the Code, which abolish the doctrine of fellow servant as to employees of railroad companies, do not apply to employees of electric street railway

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companies; but that the words "railroad company" as employed in those sections were only intended to apply to railroads proper, or commercial railroads; and that the language of the Constitution and of the statute passed in pursuance thereof, and the history and reason of these provisions, indicate that street railways were not intended to be embraced.

That decision and the argument by which it is supported apply with equal force to clause 51 of section 1294-d of the Code.

The crossing of the steam railway, however, by the trains of the plaintiff in error was, without doubt, attended with danger and it was the duty of plaintiff in error, under the general law, to use the utmost care and diligence of a cautious person for the protection of its passengers; and it may well be that the duty thus imposed would have been as great as that which is set forth in the instruction; but it would have been for the jury to say whether or not, under all the circumstances of the case, the railroad company had fulfilled the measure of its duty, while in this instruction the jury was told, as a matter of law, that the failure to do the particular thing indicated was proof of negligence. We are of opinion that it was error to give this instruction.

The fifth instruction tells the jury that it was the duty of those in charge of the electric train of the Washington, Alexandria and Mt. Vernon Railway Co. to exercise the same care or degree of care to avoid a collision as is required to be exercised by persons driving or operating any ordinary vehicle across steam railroad tracks, and that it was the duty of the persons operating the electric train to look and listen for any approaching engine or train on said steam road, and that if the jury believe from the evidence that they failed to do so, the said Washington, Alexandria and Mt. Vernon Railway Co. was guilty of negligence, and if the jury believe from the evidence that the plaintiff was injured by said negligence they shall find for the plaintiff.

A person driving in an ordinary vehicle, upon approaching a railroad crossing, must exercise ordinary care for his own pro-

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tection, while the plaintiff in error, being itself a carrier of passengers, was under a higher obligation, for it was responsible for the slightest negligence on its part, and was bound to use the utmost care and diligence of a cautious person to protect its passengers from injury. As this instruction imposed upon the plaintiff in error a lighter burden than the law warranted, we do not perceive that it was aggrieved in this respect.

The fifth assignment of error is to the refusal of the court to give the eleventh instruction, which is as follows: "Even though the jury may believe from the evidence that the employees of the defendant company were guilty of negligence in approaching the crossing of the steam railway, and in proceeding to cross it without exercising due care, yet if they further believe from the evidence that notwithstanding the said act of negligence of the defendant company the accident would not have occurred but for the independent negligence of the Southern Railway or its employees, and that if the Southern Railway Company's employees had acted with due diligence, and had approached said crossing in a duly careful manner, that the presence of the cars of the defendant company on said crossing could and would have been discovered in time to avert the accident, and that the injuries complained of resulted from such neglect, the neglect of the Southern Railway Company must be considered as the proximate cause of the accident, and that of the defendant the remote cause, and the verdict should be for the defendant."

We see no error in refusing this instruction. Upon the face of the instruction we do not think it presents a case of the intervention of the act of a responsible agent, to whose misconduct the injury is to be referred as a proximate cause, so as to render the original and conceded negligence of the defendant company the remote cause, or mere condition of the accident.

For the error in granting the third instruction, however, the judgment must be reversed, and the cause remanded for a new trial.

*Reversed.*

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**Richmond.****WHITE v. BONNEY.**

March 10, 1910.

Absent, Buchanan, J.

**1. TROVER—Title of Plaintiff—Choses in Action—Unendorsed Check.**

The owner of evidences of debt, such as bills, notes, checks and the like, may maintain trover in his own name for their conversion, though he could not have maintained in his name an action on the instrument itself. Thus the owner of an unendorsed certified check, who is not the payee thereof, may maintain trover for its conversion, although he could not maintain an action on the check in his own name to recover its proceeds. Property in the plaintiff and the right to possession is all that is necessary to maintain trover.

Error to a judgment of the Court of Law and Chancery of the city of Norfolk in an action of trover. Judgment for the defendant. Plaintiff assigns error.

*Affirmed.*

The opinion states the case.

*J. Edward Cole*, for the plaintiff in error.

*John G. Tilton* and *R. W. Tomlin*, for the defendant in error.

WHITTLE, J., delivered the opinion of the court.

This was an action of trover, brought by the plaintiff in error, F. E. White, against the defendant in error, H. G. Bonney, to recover damages for the alleged wrongful conversion of two checks. One of these checks was drawn by Huff, Andrews & Thomas Company upon the Flat Top National Bank of Bluefield, W. Va., for \$150; the other was the check of the Flat Top

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Grocery Company on the same bank for \$175, and both were payable to the order of the plaintiff, White. These checks were endorsed by W. F. Richardson as follows: "F. E. White, by F. E. Richardson, for the White Horse Medicine Company," and were delivered by Richardson to Bonney with the request that he would collect them through one of the Norfolk city banks, and pay over the proceeds to him, which arrangement was carried out by Bonney without compensation or profit.

The evidence was to the last degree conflicting, but regarding the case, as we must regard it, as upon a demurrer to the evidence by the plaintiff, it appears that the money represented by the two checks was not due to White, but belonged to the White Horse Medicine Company, being the purchase price of goods sold by Richardson, its vice-president and general manager. The theory of the plaintiff—which he sought to maintain by objection to the introduction of evidence tending to show ownership of the money represented by the checks in the White Horse Medicine Company, by instructions, and by motion for judgment *non obstante veredicto*—proceeds upon the assumption that the checks, having been certified by the Flat Top National Bank, constituted a legal assignment to him of the funds upon which they were drawn, by virtue of the "Negotiable Instruments Law" (Va. Code, 1904, sec. 2841-a, subsections 187, 189).

The defendant concedes that an action on the checks would have to be brought in the name of the payee, but insists that an action of trover for their wrongful conversion should be brought in the name of the real owner of the instruments. Such was the opinion of the learned judge of the Court of Law and Chancery of the city of Norfolk, and the case was tried upon that theory.

In 28 Am. & Eng. Enc. L. 656, the general principle is stated as follows: "The owner of evidences of indebtedness, such as bills, notes, bonds, etc., may maintain trover in his own name for their conversion, though he could not have maintained in his name an action on the instrument itself. Thus, the owner of a note may maintain trover therefor, though there has been no endorsement of the note to him."



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This general statement of the rule is well sustained by authority.

In *Donnell v. Thompson*, 13 Ala. 440, the court said: "It is contended, that as it does not appear that the note was indorsed to the plaintiff, he cannot maintain this action. A question very similar to this arose in the case of *Clowes v. Howley*, 12 Johns. R. 484. The plaintiff in that case brought trover for the conversion of a bond, conditioned to make title to land. The bond had been assigned to him, but it was admitted that he could not sue the obligor of the bond in his own name, and if the suit was on the bond itself, it must have been brought in the name of the obligee. Yet the plaintiff was permitted in this form of action to recover the value of the bond, which was estimated by the value of the land. This authority shows that the owner of a note or bond may bring trover for its conversion, although if suit had been brought on the instrument itself it must have been brought in the name of the payee or obligee. Nor do we see any reason why the owner of a bond, or note, may not maintain trover for its conversion upon his possession, although the instrument be not payable to him. It is a mere chattel, and all that is necessary to maintain trover is property in the plaintiff, and the right to possession."

So, in *Tilden v. Brown*, 14 Vt. 16, 167, the court says: "It is not the person who last had manual custody of the paper, or he to whom the check or note is made payable, who is to maintain an action for its conversion, but he who was the legal owner or beneficially interested in the check or the money secured by it."

It follows, therefore, from these authorities, that in trover for the conversion of these checks the right of action is in the real beneficial owner, the White Horse Medicine Company and not in the plaintiff in error, White.

For these reasons we think the judgment of the lower court is right and should be affirmed.

*Affirmed.*

**Syllabus.**

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**Richmond.**

**BRAGG'S ADMINISTRATOR v. NORFOLK AND WESTERN R'y Co.**

March 21, 1910.

1. **CARRIERS—Railroads—Passenger—Employee Riding on Trip Pass.**  
An employee of a railroad company riding on a trip pass, between his home and place of business, furnished by the company is entitled to be treated as a passenger. .
2. **CARRIERS—Railroads—Passenger Carried Beyond Station—Helpless Condition—Ejection—Care of Carrier.**—A railroad company which has carried a passenger beyond his point of destination has the right to put him off, but if it knows that he is in a helpless and irresponsible condition, although voluntarily imposed, it should not exercise its right of removal at a time or place, or under circumstances, where he will be exposed to great hazard. The company must exercise its right with due regard to the life and safety of such passenger. If a passenger who is known to be in a helpless condition, mentally and physically, is removed from a train by the conductor and placed in charge of a station agent of the company, and the latter, knowing his condition and without effort to prevent it, permits him to wander off alone in a deep snow, when the weather is severe and night rapidly approaching, and die of exposure, the company is liable.
3. **CARRIERS—Railroads—Helpless Passenger—Place of Ejection—Negligence.**—A declaration which simply alleges that a passenger who had been carried beyond his destination, and who was mentally and physically incapable of caring for himself, was put off in the daytime, at a regular station where there was a depot, that he was not familiar with the place and that it was sparsely settled, but fails to aver that the weather was severely cold, or that the ground was covered with snow, or any fact showing that the character of the place was such as to make it dangerous, fails to show negligence on the part of the carrier, and is, therefore, bad on demurrer.

Error to a judgment of the Circuit Court of Rockbridge

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county in an action of trespass on the case. Judgment for the defendant. Plaintiff assigns error.

*Reversed.*

The opinion states the case.

*C. S. McNulty, H. S. Rucker and Glasgow & White*, for the plaintiff in error.

*Marshall McCormick and E. M. Pendleton*, for the defendant in error.

BUCHANAN, J., delivered the opinion of the court.

This is an action to recover damages from the Norfolk and Western Railway Company for negligently causing, as is alleged, the death of the plaintiff's decedent.

The trial court held, upon demurrer, that neither of the two counts of the plaintiff's amended declaration stated a cause of action, and entered a final judgment in favor of the defendant company.

As the question involved in this writ of error arises on demurrer, we are only concerned with the averments of the declaration. It is averred in substance in the first count that the plaintiff's intestate, who was the telegraph operator of the defendant at Lochlaird, a station near Buena Vista, on the line of its road running from the city of Roanoke to Hagerstown, Maryland, on the 24th day of December, 1908, went to his home in Roanoke city on a trip-pass issued to him by the defendant to travel from Buena Vista to Roanoke and return; that he remained at his home on that day until near 1:30 o'clock in the evening, when he boarded a passenger train of the defendant to return to his place of work; that when he entered the train he was more or less under the influence of some intoxicating liquor, or not in his right mind from other causes; that before the train reached Buena Vista he went to sleep, or for some other cause

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became mentally irresponsible, and the defendant, through its negligence, failed to arouse him at that station or aid him in leaving the train, but carried him on to the second station beyond his point of destination where he was forcibly ejected from the train by the defendant when he was in a drunken and irresponsible condition, or had lost his reason, and was crazy from causes unknown to the plaintiff, and when he was, on account of his said condition, unable to take care of and protect himself against the natural, inevitable, and immediate dangers to which he was exposed from being ejected at a sparsely settled station where he was not familiar with his surroundings; that when he was ejected at that place, notwithstanding his said condition and surroundings, in violation of its duty to him the defendant failed to put him in a place of safety or in charge of someone who would look after and guard him against the said dangers when he was utterly incapable, mentally and physically, of protecting himself; that as the direct and natural result of the said negligence the plaintiff's intestate, being physically and mentally unable to care for and protect himself, wandered aimlessly in the cold, snow and darkness along and on the railroad track of the defendant until overcome by the cold and exposure he fell beside the track where he was found the next morning in an unconscious condition, and died that day. It is further averred that the said irresponsible condition, both mentally and physically, of the plaintiff's intestate at the time he was ejected and while he was on the train was known to the defendant.

The second count is substantially the same as the first, except that it contains the additional averments, that when the plaintiff's intestate was ejected from the train, night was rapidly approaching, the climatic conditions were severe, the ground being covered with about fifteen inches of snow; that the conductor and other agents of the defendant attempted, when the plaintiff's intestate was ejected, to place him under the care and protection of the station agent, in order that he might protect the decedent from the dangers into which he would naturally

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be expected to fall in his then said irresponsible condition; that the station agent, knowing the irresponsible mental and physical condition of the decedent and that he had been placed in his care by the conductor and servants of the defendant to be cared for until the decedent could care for himself, wholly neglected to perform that duty, and declared that he did not have time to bother with a drunken or crazy man, and permitted and actually saw the plaintiff's intestate wander off alone in the rapidly declining afternoon, when the ground was covered with fifteen inches of snow, and negligently failed and refused to make any effort to prevent the decedent from wandering away when the natural, probable and inevitable result would be his death.

Whether or not the defendant company was negligent in not waking up and putting off the plaintiff's intestate at Buena Vista, his point of destination, or at the next station reached by the train, need not be considered, as the failure to put him off the train at either of those places was not the proximate cause of his death. It is clear that the plaintiff's intestate, whether his remaining on the train after he reached his point of destination was the result of the defendant's negligence, or of his mental and physical condition, was, under the averments of the declaration, entitled to be treated as a passenger. 4 Elliott on Railroads, sec. 1578-a; 2 Hutchinson on Carriers, secs. 1016, 1018.

When the defendant found that it had carried him beyond his point of destination, it had the right to put him off the train, though if it were negligent in carrying him beyond his station it would have been its duty to return him to that point; but if it knew that he was in a helpless and irresponsible condition in body and mind, it should not have exercised its lawful right of removal at a place or time, or under circumstances, where he would be exposed to great hazard.

Hutchinson on Carriers (3d ed.), sec. 1083, in discussing the subject of the right of a common carrier to eject females, sick or intoxicated passengers, says: "Female passengers and pas-

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sengers who are sick or suffering from some mental or physical infirmity necessarily cannot be ejected at times and places where the carrier should know that their sex or condition would especially expose them to insult or injury. And this rule is true whether the attendant danger arises from natural infirmity of the person or was self-imposed. Thus, if a person on a train is so intoxicated as to render him unconscious of danger and unable to appreciate his position, surroundings and perils, and his duty to avoid them, or does not possess the power of locomotion, and is put off the train by the conductor on account of his misconduct, and the place where he is put off and left is dangerous to one in his condition, and these facts are known to the conductor, he would be guilty of recklessness and wanton negligence, rendering the company liable for damages resulting from his negligence, although the person ejected and injured might have been legally ejected in a proper manner and at a proper place. But in order to subject the company to liability for such an act the condition of the person so ejected must be such that it would reasonably indicate to the carrier's servants that he, on account of his condition and the surrounding circumstances, would be liable to injury by being left at the place where ejected."

It is well settled that all persons in the exercise of their rights, or in the performance of their duties, should exercise their rights or perform their duties with a reasonable regard for the preservation of human life and the prevention of serious bodily harm, or the infliction of unnecessary injury upon others, and that as a general rule they may be held responsible for the manner in which their rights are exercised or their duties performed.

The statement of the rule of law by Mr. Hutchinson is not only founded in reason but is fully sustained by the decided cases. See *L. & N. R. Co. v. Johnson*, 108 Ala. 62, 19 South. 51, 31 L. R. A. 372; *Isbell v. New York, &c., Ry. Co.*, 27 Conn. 393, 71 Am. Dec. 78; *Railway Co. v. Valleley*, 32 Ohio St. 345, 30 Am. Rep. 601; *Connoley v. Crescent City R. Co.*, 41 La.,

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Ann. 57, 5 South. 259, 6 South. 526, 3 L. R. A. 133; *Indianapolis P., &c., R. Co. v. Pitzer*, 109 Ind. 179, 3 N. E. 310, 10 N. E. 70, 58 Am. Rep. 387; *Roseman v. Carolina, &c., R. Co.*, 112 N. C. 712, 16 S. E. 766, 34 Am. St. Rep. 524, 19 L. R. A. 327; *Louisville, &c., R. Co. v. Sullivan*, 81 Ky. 624, 50 Am. Rep. 186; *Brown v. Chicago, &c., R. Co.*, 51 Iowa 235, 1 N. W. 487; *Atchinson v. Weber*, 33 Kan. 543, 6 Pac. 877, 52 Am. Rep. 543; *Southern Ry. Co. v. Back*, 103 Va. 778, 50 S. E. 257; 4 Elliott on Railroads, sec. 1637.

In most, if not all the cases, where the railway company has been held negligent for the manner in which it exercised its right to eject a passenger or other person from its train, it appeared that there was something in the condition of the weather and of the place where he was ejected that would naturally imperil his safety in addition to his intoxicated condition.

In *L. & N. Ry. Co. v. Johnson, supra*, the passenger, who was very drunk, was ejected in a cut on the road where there was no escape except up or down the railroad track along the sides of which there was room for a person to walk. The night was dark and it was raining. At one end of the cut there were cattle guards which could be passed only by walking on the track. At this point the ejected passenger was struck and killed by a train.

In *L. & N. R. Co. v. Sullivan, supra*, the injured person, who was helplessly drunk, was expelled not at a station and in the snow.

The first count in the declaration under consideration wholly fails to aver any facts either as to the weather or the character of the grounds in and about the station. It alleges in general terms that the intestate was not familiar with the place, and that it was sparsely settled. These allegations do not, in our opinion, show that the defendant was guilty of negligence in ejecting the intestate at that point. He was ejected in the daytime, at a regular station of the defendant where there was a depot. It is not averred that it was severely cold or that the ground was

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covered with snow, nor is any fact averred which shows that the character of the place was such as made it dangerous. We are of opinion, therefore, that the court properly sustained the demurrer to that count.

The second count, we think, states a good cause of action. In addition to the averments of the first count it states that the intestate was ejected when night was rapidly approaching, the climatic conditions severe, the ground covered with fifteen inches of snow; and that the conductor and other servants of the defendant, on account of the intestate's condition and surroundings, attempted to place him in the care and protection of the station agent of the defendant; that the station agent, knowing the decedent's condition and that he had been placed under his care and protection until he was capable of taking care of himself, neglected and refused to care for him, but permitted, and actually saw the intestate in his irresponsible condition wander off alone down the railroad track without making any effort to prevent it, although he had full knowledge of the intestate's irresponsible condition, and the dangers which surrounded him.

The judgment of the trial court must be reversed, its judgment set aside, and such order entered by this court as the trial court ought to have entered, sustaining the demurrer to the first count, overruling it as to the second, and remanding the cause for further proceedings not in conflict with the views expressed in this opinion.

*Reversed.*



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**Statement.**

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**Richmond.****GRINELS v. DANIEL.**

March 21, 1910.

Absent, Harrison, J.

1. NAVIGABLE WATERS—*Riparian Owners—Lease of Land For Wharfs—Use For Other Purposes.*—The lease of a parcel of land on the beach of a navigable river for the purpose of erecting thereon a steamboat wharf does not deprive the lessor of his riparian rights to any greater extent than is necessary to enable the lessee to erect the wharf and use it for the purposes for which it was built. Neither the lessee nor any person claiming under him has any right to erect, or to authorize any other person to erect, on the leased premises, or between low water mark and the line of navigability of said river, houses for carrying on, or to carry on any business not connected with that of conducting the wharf.
2. NAVIGABLE WATERS—*Riparian Owners—Land Between Low Water and Line of Navigability—Title.*—The title to the land between low water mark and the line of navigability of the public waters of this State is in the Commonwealth, but the riparian owner has a qualified right in the same land which is property and is valuable, and of which he cannot be deprived except in accordance with established law, and, if for a public use, upon due compensation.
3. NAVIGABLE WATERS—*Riparian Owners—Consent to Buildings for Particular Purpose—Use for Other Purposes.*—The consent of a riparian owner who has let a part of his land for the purposes of erecting a wharf thereon for the lessee to erect houses between low water mark and the line of navigability, for the purpose of "barreling oysters," does not authorize the use of said houses for carrying on a mercantile business, nor does the assignment of said land to the lessee by the State for oyster planting purposes confer upon him any such right.

Appeal from a decree of the Circuit Court of Middlesex county. Decree for defendant. Complainant appeals.

*Reversed.*

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The opinion states the case.

*Hathaway & Norris, J. R. Saunders and Scott, Buchanan & Cardwell*, for the appellant.

*Thos. G. Jones and Herbert I. Lewis*, for the appellee.

BUCHANAN, J., delivered the opinion of the court.

In the year 1883, S. Grinels, who was the owner of a tract of land lying in the county of Middlesex, fronting on the Rap-  
pahannock river, entered into an agreement with Georgiana Wil-  
liams and Matilda S. Forbes by which he leased to them and  
their successors one-fourth of an acre of land, "situated on the  
beach of the river, together with a right of way through the  
lands of the said Grinels, to be used by the parties of the second  
part for the purposes of constructing a steamboat wharf, and to  
give the public an uninterrupted travel thereto and from."  
The wharf was built and has ever since been used by the lessees  
and their successors for the purposes for which it was built.

The lessor was at that time, in connection with his son, the ap-  
pellant, carrying on a general merchandise business, including  
the buying and selling of oysters and fish, on his land near the  
wharf. Subsequently they erected a breakwater, running paral-  
lel with the shore, in front of the land to make a safe and con-  
venient harbor for the craft accustomed to ply in those waters.

In the year 1897, or 1898, two houses were erected on piles in  
the river near the wharf, between low water mark and the line  
of navigability, by and with the consent of S. Grinels, for the  
purpose of barreling oysters and perhaps crabs. These houses  
are now occupied and used by George W. Daniel, the appellee,  
for carrying on "various lines of commercial business."

After these houses were erected S. Grinels departed this life,  
leaving a will by which his son, James Grinels, the appellant,  
became the owner of the land fronting the river where the said  
wharf and houses were erected.

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The object of this suit, which was brought by the appellant, was to restrain the appellee from occupying and using the said houses, from erecting new buildings, and from doing any business except such as is consistent with the proper conduct of the wharf, and such business as is properly connected with carrying passengers and freight to and from the wharf; to adjudicate the appellant's rights; and to ascertain and recover the damages inflicted upon him by the alleged wrongful acts of the appellee in the occupation and use of the said houses.

The right of the appellant to the relief sought is denied by the appellee upon two grounds. First, that the appellant has no riparian rights growing out of the ownership of the land, because his father, S. Grinels, in his lifetime had parted with all riparian rights to the land by his lease to Williams and Forbes for the erection of the wharf; and, second, if he did not part with his riparian rights when the lease was made, he and those who claim under him are estopped from asserting such rights against the appellee because of S. Grinels' conduct in consenting to and inducing the appellee and those he claims under to incur costs and great outlay in erecting the said buildings.

As to the first contention it is clear that S. Grinels, in leasing the quarter of an acre of land for the erection of the wharf, did not part with his riparian rights to any greater extent than was necessary to enable the lessees to erect the wharf and use it for the purposes for which it was built. Manifestly the lessees and those who claim under them had no right to erect themselves, or authorize any other person to erect, houses for carrying on, or to carry on, any business not connected with that of conducting the wharf. Even if the owners of the wharf did consent to the erection of the houses, which is claimed but not proven, they could confer no greater rights than they had upon the appellee and those he claims under.

The houses, as clearly appears from the evidence, and as is admitted in the appellee's answer, were erected by the permission and consent of S. Grinels. It appears from the testimony

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of the appellee's own witnesses, Topping and E. Grinels, who built the houses, that they were erected for the purpose of "barreling oysters." The record does not show that the appellee had the right under the license or permission from S. Grinels to occupy or use the houses for any other purpose. Subject to that license and the lease to Williams and Forbes, S. Grinels at his death was clothed with all the riparian rights belonging to such property.

It is true, as contended by the appellee, that the title to the land between low water mark and the line of navigability is in the Commonwealth (*Taylor v. Commonwealth*, 102 Va. 759, 47 S. E. 875, 102 Am. St. Rep. 865, and authorities cited), but it is equally true that between low water mark and the line of navigability the riparian owner has a qualified right. "He is entitled," as was said by Mr. Justice Miller in *Yates v. Milwaukee*, 10 Wall. 497, 19 L. Ed. 984, "to the rights of a riparian owner whose land is bounded by a navigable stream; and among those rights are access to the navigable part of the river from the front of his lot, the right to make a landing wharf or pier for his own use or the use of the public, subject to such general rules and regulations as the legislature may see proper to impose for the protection of the public. This riparian right is property and is valuable; though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired. It is a right which when once vested the owner can only be deprived of in accordance with established law, and if necessary that it be taken for the public good, upon due compensation."

This language is quoted with approval in *Taylor v. Com'th*, *supra*, 102 Va. at p. 771, as well as in the case of *Norfolk City v. Yates*, 27 Gratt. 430, 435. In the latter case it was held that the city of Norfolk, which owned land extending to low water mark, was entitled to recover in an action of unlawful entry and detainer the water lot lying between Park street and the port warden's line, both as riparian owner and as having had

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long possession thereof, from an intruder or trespasser upon the land. The city as riparian owner, as was said in that case, had the same rights and privileges as an individual riparian owner.

The other contention of the appellee—that the license granted by S. Grinels was irrevocable because of S. Grinels' conduct in consenting to and inducing the appellee and those under whom he claims to incur costs and expend money in the erection of said houses—need not be considered.

While the appellant in his bill sought to have the appellee restrained from occupying and using the houses for any business except that connected with the wharf, in his reply brief he says he "is not seeking to deprive the appellee of the right to the use of the houses for the purpose of buying and selling oysters and crabs, notwithstanding the fact that that right being a mere license can be terminated at the will of the other party." Neither did the assignment of the quarter acre of land to the appellee by the State for oyster-planting purposes confer upon him the right to use said houses for carrying on a mercantile business. Code, sec. 2135-b.

Upon the whole case we are of opinion that the appellant was entitled to have the appellee restrained from occupying and using the houses for carrying on any other business than that of barreling oysters and crabs, and that the trial court erred in not so holding. Its decree dismissing the bill must, therefore, be set aside and annulled, and this court will enter an order restraining the appellee from carrying on in the said houses any business other than "barreling oysters and crabs," and will remand the cause to the trial court with directions to ascertain through one of its commissioners (if it be insisted upon) the amount of damages sustained by the appellant by the acts of the appellee in carrying on in said houses any business other than that of barreling oysters and crabs, and grant such other relief as may be proper in the premises.

*Reversed.*

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Syllabus.

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## CRIMINAL CASES.

### **Staunton.**

COMMONWEALTH V. HENRY AND COMMONWEALTH V. SHANNON.

September 21, 1909.

1. **INTOXICATING LIQUORS—“Byrd Liquor Law”—Constitutionality—“Malt Beverages.”**—The object of section 23½ of the act of Assembly approved March 12, 1908, commonly called the “Byrd Liquor Law” was to regulate and control the sale and distribution of the by-products of the brewry commonly known as “malt beverage,” sometimes called “Small Brew” and “Near Beer.” The legislature clearly has the power to enact such a statute, as well under the comprehensive provisions of section 62 of the Constitution as under the general police powers of the State, and its provisions are not oppressive or unreasonable. Whether such a statute is wise and proper, or not, is a question for the legislature, and not for the courts to determine.
2. **INTOXICATING LIQUORS—Sale—Regulation—Police Power.**—The regulation of the sale of intoxicating liquors is completely within the police power of the State, and may be exercised in such manner as the legislature deem proper. It may be entirely prohibited, or such restraints may be placed as the legislature thinks wise, without supervision or control by the courts. If, for the purpose of preventing evasion, or the fostering of an appetite for stronger liquors, the legislature deem it wise to forbid the sale of any alcoholic admixture, by whatever name it may be called, it has ample power to do so.
3. **INTOXICATING LIQUORS—Sale—Regulation—Police Power—Constitutional Law.**—The regulation of the sale of intoxicating liquors is a police regulation, and the power of the State over such regulations is supreme. Section 23½ of the “Byrd Liquor Law” is not, therefore, in conflict with amendment fourteen of the Constitution of the United States, nor of any other provision of said Constitution.
4. **CONSTITUTIONAL LAW—Statutes—Powers of Legislature.**—The power of the legislature of the State is supreme except so far as it is restrained by the State or Federal Constitution, and even in case of doubt as to the power, all doubts are to be resolved in favor of

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Statement.

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the existence of the power. The courts have no power to declare an act unconstitutional unless it is so clearly and plainly so that there can be no doubt on the subject.

5. CONSTITUTIONAL LAW—*Class Legislation—Byrd Liquor Law*.—Section 23½ of the “Byrd Liquor Law” is entirely consonant with the whole enactment, and is aimed at the regulation and control of the sale of intoxicating liquors, and its purpose was not to discriminate in favor of a few persons against the other members of the community.

Error to a judgment of the Circuit Court of Frederick county in the case of *Commonwealth v. Henry*, and to a judgment of the Circuit Court of Giles county in the case of *Commonwealth v. Shannon*. In each case the Commonwealth assigns error.

*Reversed.*

The opinion states the case. Section 23½ of the “Byrd Liquor Law” is as follows:

*“Meaning of ‘malt beverage’; license for manufacture of and the sale of same; bottles, how marked; fine for violation of provision.*

“23½. That ‘malt beverage,’ within the meaning of this section, shall be construed to be the product of a brewing plant, or brewery, and shall, as to its composition, comply with the standards now or as may hereafter be prescribed by the pure food commissioner of the United States, but shall be non-intoxicating, and in no event contain in excess of two and one-quarter per cent. in volume of alcohol.

“No person, firm, or corporation shall manufacture ‘malt beverage,’ as herein defined, except subject to the provisions of this act.

“‘Malt beverage’ shall be manufactured only by some person, firm or corporation having a manufacturer’s malt liquor license, and who shall, before manufacturing the same, pay an additional special license tax of two hundred and fifty dollars (\$250.00) per year and execute a bond in the penalty of ten thousand dollars (\$10,000) before and with security (either

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personal or corporate) approved by the judge of the circuit or corporation court of the county or city in which such manufacturing is proposed to be done; the condition of said bond shall be to faithfully comply with the provisions of this act.

“ ‘Malt beverage’ shall be sold by the manufacturer direct to the consumer (not to be drunk where sold) and in quantities of not less than one-half dozen bottles, nor more than four dozen bottles at any one time, and shall not be sold or offered for sale by any other person, firm or corporation. ‘Malt beverage’ shall be sold only in bottles in which shall be blown, in letters at least one-half inch in height, the name and address of the manufacturer, and the words ‘malt beverage.’ No person, firm, or corporation shall place in such bottles and sell or otherwise transfer any liquid containing alcohol in excess of two and one-quarter *per cent.* in volume.

“Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not less than five hundred dollars nor more than one thousand dollars, or, in the discretion of the jury, confined in jail for not less than three months nor more than twelve months for each offense.”

*Wm. A. Anderson, Attorney General, and R. M. Ward, for the Commonwealth.*

*R. T. Barton and L. O. Wendenburg, for R. M. Henry.*

*McCormick, Henson & Brown, for Charlie Shannon.*

CARDWELL, J., delivered the opinion of the court.

These two cases will be considered together because they both involve the same general question.

In the first-named case the defendant in error, H. M. Henry, was arrested on the 9th day of September, 1908, upon a warrant of the police justice of the city of Winchester, charging



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him with the sale of "malt beverage," in violation of the provisions of section 23½ of chapter 189 of the act of Assembly approved March 12, 1908 (Acts 1908, p. 275), now commonly known as the "Byrd Liquor Law."

Upon the hearing of the warrant Henry was convicted and fined, the judgment of the justice being as follows: "Judgment on the 9th day of September, 1908. The defendant, Robert M. Henry, is found guilty upon the testimony and oath of S. A. Seabright, and the said R. M. Henry pleading guilty, and it is adjudged that he pay a fine of five hundred dollars."

From this judgment Henry immediately appealed to the Corporation Court of the city of Winchester, and was recognized in the sum of \$600, with surety, to appear on the first day of the next term of that court, which was to convene on September 21, 1908. His appeal was docketed in the corporation court, and afterwards Henry appeared with his surety and the latter asked that he be discharged from his suretyship on the said recognizance executed by Henry before the justice, which was accordingly done; and thereupon Henry was placed in the custody of the sergeant of the city of Winchester.

Immediately upon the entry of the order committing him to the custody of the sergeant, the sergeant was served with a writ of *habeas corpus*, issued by the Honorable T. W. Harrison, judge of the Circuit Court of Frederick county, upon the petition of Henry himself.

In the petition Henry sets out, among other things, that he had never sold, though he was charged with selling, something called "malt beverage," but that he had sold by the bottle, and to be drank at the place where sold, a product called "Small Brew," and that this is substantially the same product under a different name; that he had not a manufacturer's license and was not a brewer; and that the bottles in which he sold "Small Brew" had not blown upon them the words "malt beverage," or the name or address of the manufacturer in letters at least one and a half inches in height. Having admitted the violation of

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section 23½ of the "Byrd Liquor Law," Henry based his application for a writ of *habeas corpus* upon the claim that said section is unconstitutional.

Upon this petition the judge of the circuit court issued his writ, and immediately Henry was brought before him and the hearing adjourned until September 26, 1908. In the meanwhile the prisoner was released on his own recognizance, formal return of the writ having been made by the city sergeant, showing that Henry was legally and by due process of law in the custody of that officer. Whereupon the Commonwealth, by its attorney, excepted to the petition upon which the writ of *habeas corpus* was issued, upon the ground that it did not show probable cause to believe that Henry was detained without lawful authority, and moved the court to dismiss the writ and remand Henry to the Corporation Court of Winchester to be there dealt with according to law. Determination of this motion was deferred by the court until it should be ready to pass upon the motion which was then made by the prisoner to be discharged from custody; whereupon the Commonwealth, by its attorney, moved to postpone the hearing upon said motion for such reasonable time, to be fixed by the judge, as to allow the Commonwealth time in which to give notice and secure and file affidavits in rebuttal of certain averments of fact alleged in the petition, and especially to prove that the beverage alleged in the warrant of arrest and admitted in the petition to have been sold by Henry in violation of section 23½ was in some cases intoxicating, even if it did not contain in excess of 2¼ *per cent.* of alcohol; but upon the objection of the prisoner, Henry, the court overruled both motions, being of opinion that the testimony desired to be secured was not competent, and refused to allow any postponement of the hearing upon the petition and his motion to be discharged from custody.

The motion of the Commonwealth to remand the prisoner to the corporation court, to be there dealt with according to law, as prayed in the return of the city sergeant, and the counter-mo-

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tion of the prisoner to be discharged from custody, as prayed in his petition for a writ of *habeas corpus*, were on September 26, 1908, fully argued by counsel, and the order to which this writ of error was awarded, discharging the prisoner from the custody of the sergeant of the corporation court, was entered, on the ground (as set out in the written opinion of the judge of the circuit court filed as a part of the order) that section 23½ of the "Byrd Liquor Law" is oppressive and unreasonable, and therefore unconstitutional.

The sole question, therefore, for our determination is whether or not section 23½ of the "Byrd Liquor Law" is valid and constitutional.

The reasoning of the learned judge for holding section 23½ unconstitutional is succinctly stated in the conclusion of his opinion as follows: "I regard the legislation as bearing upon a particular, defined type of harmless malt product, which must be construed in relation to the legislative treatment accorded other forms of malt liquor. So viewed, I regard the prohibition and regulation imposed upon this particular type and brand to the last degree oppressive and unreasonable, and that, therefore, the law is unconstitutional."

The purpose of the act of the legislature, commonly known as the "Byrd Liquor Law," is in the title of the act declared to be "to define and regulate the sale, distribution, rectifying, manufacture and distilling of intoxicating liquors and malt beverages, and to impose a license tax thereon," etc. The act first defines what shall be deemed ardent spirits, and specifically names whiskey, brandy, beer, etc., as included therein, because of the fact that these liquors contain a percentage of alcohol sufficient to produce intoxication if a sufficient quantity is taken. Section 23½ was designed to regulate and control the sale and distribution of the by-products of the brewery commonly known as "malt beverage"; by whom it may be manufactured and sold; it being provided that "malt beverage" shall be sold by the manufacturer only to the customer, not to be drunk where sold,

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and in quantities of not less than one-half dozen bottles nor more than four dozen bottles at any one time, and that it shall not be sold or offered for sale by any other person, firm or corporation; that "malt beverage" shall be sold only in bottles in which shall be blown in letters at least one-half an inch in height the name and address of the manufacturer, and the words "malt beverage"; and that no person, firm or corporation shall place in such bottles and sell, or otherwise transfer, any liquid containing alcohol in excess of  $2\frac{1}{4}$  *per cent.* in volume. The penalty fixed for violating any of the provisions of the section is a fine of not less than \$500 nor more than \$1,000, or, in the discretion of the jury, confinement in jail for not less than three nor more than twelve months for each offense.

"Malt Beverage," "Small Brew," and "Near Beer," are, as it would seem, synonymous terms, and are used to designate a class of beer, the sale and distribution of which is sought to be regulated and controlled by section 23 $\frac{1}{2}$  of the "Byrd Liquor Law," and in that act are put among the class of "mixtures, preparations and liquids" in which alcohol appears in varying proportions with other ingredients, and which may or may not be used as beverage, or may or may not contain alcohol in such proportion with the other ingredients that the stomach can bear enough of the mixture to produce intoxication, malt liquors being classified as within or without the ardent spirits class, according as they will or will not produce intoxication. Doubtless the legislature took cognizance of the well-known fact that the minimum *per cent.* of alcohol in what is commonly known as beer is  $2\frac{1}{4}$ ; and that even this, the weakest form of beer, had been found to be intoxicating, and on this account arbitrarily fixed upon this percentage as the differential between beer and the class of "near beer," and gave to the latter class the name of "malt beverage." Why it should have been so denominated is immaterial.

Section 23 $\frac{1}{2}$  was intended to prescribe regulations for the

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manufacture and sale of "malt beverage," which it is declared shall be "non-intoxicating and in no event contain in excess of  $2\frac{1}{4}$  per cent. in volume of alcohol" and to remove this class of malt liquors from the operation of the words "all other intoxicating liquors" found in section 1 of the act. A fine of not less than five hundred dollars nor more than one thousand dollars, or in the discretion of the jury confinement in jail not less than three nor more than twelve months, for each offense is imposed upon any person violating the provisions of this section.

The question for our determination is whether or not the legislature, in enacting this section, exceeded the police power of the State.

There can be no question that among the police powers of the State, and especially under the provisions of section 62 of the Constitution, the legislature has the power to regulate the traffic in intoxicating liquors, not only because it is inherently harmful, but by way of preventing an abuse if the privilege is granted.

The learned judge below seems to have based, in a large degree at least, his conclusion that section 23 $\frac{1}{2}$  of the act is unconstitutional, upon the assumed harmlessness of the traffic in "malt beverages"; but this assumption ignores the obvious fact that "malt beverage" is not the name of a particular brand of non-intoxicating and unadulterated malt liquor, but the generic name of a large variety of malt liquors, all of which are permitted to contain a percentage of alcohol, and some of which may be intoxicating and unwholesome; and that the object of the section is to allow the manufacture of the pure and non-intoxicating malt beverages, and to punish the sale of the unwholesome and intoxicating kinds of malt beverages; and further ignores the well settled doctrine that the traffic in alcoholic drinks, being peculiarly liable to abuse, is peculiarly a subject for the exercise of the general police powers of the State."

Section 62 of the Constitution is: "The General Assembly

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shall have full power to enact local option or dispensary laws, or any other law controlling, regulating or prohibiting the manufacture or sale of intoxicating liquors.”

Section 23½ of the “Byrd Liquor Law” seems to us to be clearly within the comprehensive provisions of this section of the Constitution, as well as within the general police powers of the State. Whether the provisions of that section are wise and proper or not is not for the courts to determine, as it is a question for the legislature. *Prison Association v. Ashby*, 93 Va. 670, 25 S. E. 893; *Huckleys v. Childrey*, 135 U. S. 662, 34 L. Ed. 304, 10 Sup. Ct. 972.

When we read section 23½ together with every section of the “Byrd Liquor Law,” it cannot be questioned that it was the object of the legislature to restrict the use of intoxicants as a baverage. In no section of the act is it sought to prohibit or regulate the manufacture or sale of any article of food or commerce which is not commonly used as a beverage and which does not contain alcohol as a distinguishing feature.

We shall not attempt to go into any refinement of distinction between malt beverages which will produce intoxication and malt beverages which will not produce that result. Suffice it to say that if the legislature saw fit to regulate and control the manufacture and sale of malt beverages containing alcohol, but less than 2¼ *per cent.*, so long as the right to do so remains within the police powers of the State, whether the regulation is satisfactory or not, the reasons therefor address themselves exclusively to the legislative wisdom.

It can be readily seen that unless some provision was made in the “Byrd Liquor Law” regulating and controlling the manufacture and sale of malt beverages, at least some of those engaged in the saloon business would close their doors as a saloon and open them as malt-liquor places, and under the guise of doing a lawful business would engage in the illicit sale of ardent spirits. This has been the experience elsewhere, as clearly appears from the reported decisions of the courts of other States,

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and it is a matter of common knowledge that it has recently been the experience in Virginia.

To place the traffic in malt beverages within the police power of the State it is not essential, we think, that its harmfulness should be inherent in the article dealt in, as traffic in a harmless article may be regulated if regulation be expedient, so as to prevent it from becoming harmful to the public health and morals. The object of this legislation (section 23½), as already remarked, is to limit the use of intoxicants, and there is no indication anywhere in the "Byrd Liquor Law," from its title to its conclusion, that the legislature deemed harmless the traffic in any kind of alcoholic beverages; on the contrary, there are the strongest indications that the legislature deemed the traffic in beer, by whatever name called, as especially likely to be harmful to the public, if not regulated, and the whole range of alcoholic drinks has been by the act regulated under one provision or another.

In *Farmville v. Hatcher*, 101 Va. 319, 43 S. E. 558, 99 Am. St. Rep. 870, 61 L. R. A. 125, and in *Danville v. Hatcher*, 101 Va. 523, 44 S. E. 723, the police powers of the legislature, independent of the constitutional provisions, are defined; and in the last-named case the court held as follows: "The regulation of the sale of intoxicating liquors is completely within the police power of the State, and may be exercised in such manner as the legislature deems proper. It may be entirely prohibited, or such restraints may be placed upon it as the legislature thinks wise, without supervision or control by the courts. The traffic is not one of the privileges or immunities of citizenship guaranteed by the Constitution of the United States, or the fourteenth amendment thereof. It may be entirely prohibited; and its regulation, when permitted, is absolutely within the discretion of the several States. These principles are sustained by the Supreme Court of the United States in a long line of decisions, rendered both before and after the adoption of the fourteenth amendment."

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“The police powers of the State with reference to the control of intoxicating liquors is to be distinguished from its powers to regulate traffic in other things. It would be different if the business sought to be followed was one of the ordinary pursuits in which all persons are enabled to engage.”

“There are also numerous decisions of courts of last resort of the States which uphold the authority of the several States in the exercise of their police power to absolutely control the liquor traffic.” See also Cooley on Const. Lim., 120.

As remarked, the restrictions imposed by section 23½ of the “Byrd Liquor Law” were to prevent the abuse which the legislature felt would almost certainly follow if the sale of malt beverages were allowed without imposing restrictions of a stringent character; and this particular form of police regulation has been the subject of numerous decisions in the several States, and the right to impose such restrictions seems not to have been seriously questioned.

Any such legislation by the State is enacted under the police power, the limits of which embrace a very broad field, in which the lawmaking power is clothed with a very broad discretion, the exercise of which the courts will not undertake to control, except in cases where the legislature has plainly transcended its power. Particularly is the police power of the State government far-reaching when it comes to deal with the subject of the regulation and control of the liquor traffic.

A strong illustration of this power is found in the decision of the Supreme Court of the United States in *Mugler v. Kansas*, 120 U. S. 623, 31 L. Ed. 205, 8 Sup. Ct. 273.

It is not claimed that it would be competent for the State government to prohibit the sale of an absolutely harmless and nutritious article of food, which contains no alcohol or other dangerous property; but the courts have gone very far in sustaining restrictive legislation in reference to cider, wines, malt liquors, and other beverages which usually contain considerable quantities of alcohol, but which may, and often do, contain such



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a small percentage of alcohol as to be absolutely non-intoxicating.

The Supreme Court of Massachusetts, in *Commonwealth v. Dean*, 14 Gray, 99, held that under a statute which made no distinction between fermented and unfermented cider, but provided that "cider and all wines shall be considered intoxicating liquors within the meaning of this act," an averment "of the sale of intoxicating liquor" was sustained by proof of the sale of unfermented cider.

The Supreme Court of Rhode Island, in *State v. Guinness*, 16 R. I. 401, 16 Atl. 510, sustained a prosecution under a statute of that State which prescribed an artificial definition, and provided that any liquor which contained more than two *per cent.*, by weight, of alcohol should be included in the term "intoxicating liquors," without proof that the liquors sold were actually intoxicating. The opinion says: "The words do not purport to change the nature of things and make liquors intoxicating which are not intoxicating, but simply enact that the words 'intoxicating liquors,' where used in the act, shall be deemed to include any liquor or mixture of liquors which shall contain more than two *per cent.*, by weight, of alcohol, whether intoxicating or not. It may be that the legislature thought that the sale of such liquors would foster an appetite for stronger liquors and should be stopped for that reason; or it may be that they thought that the establishment of such a percentage would make it easier to enforce the law as a law to suppress the traffic in intoxicants by making evasion more difficult. We think that in either view the enactment is constitutional as an exercise of police power." See also *Commonwealth v. Goodwin*, 109 Va. 528, 64 S. E. 54, and cases there cited.

The law on the subject is strongly and fairly stated in Freund on Police Power, sec. 32, as follows: "Some courts have said that the legislative determination that some substance or mixture is intoxicating or unwholesome is conclusive. But such a statement cannot be accepted without qualification. Alcohol

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is, as a matter of fact, intoxicating if taken in sufficient quantity. To cut off controversies as to the intoxicating quality of different kinds of drinks the legislature may define as intoxicating all liquors containing a certain percentage of alcohol. If such liquors when consumed to excess produce in normal cases intoxication, they are very properly described as intoxicating, although they may not have that effect in such particular case. Where the alcohol is so much diluted as to be harmless a legislative fiat will not make it intoxicating. But if the legislature, for the purpose of preventing evasion or in order that an appetite for stronger liquors may not be fostered, deems it wise or necessary to forbid any alcoholic admixture, it may do so, since it thereby interferes at most with the gratification of a pleasure."

In the recent case of *Campbell v. City of Thomasville*, decided by the Court of Appeals of Georgia, and reported in 64 S. E. 815, there was under review an ordinance adopted by the city of Thomasville, under the general welfare clause of its charter, designed to regulate the sale of "near beer," and it was held, that "the selling of 'near beer' is a business, which, from its very nature, admits of strict regulation under the police power. It stands legitimately in a different class from the business of selling drugs, soda water and similar liquids. Regulations may be upheld as applied to this occupation which would be arbitrary and unreasonable if there were an attempt to apply them to any other business." In the course of the opinion it is said: "The very possibility which 'near beer' and imitations and substitutes for beer and other intoxicating liquors afford toward the palming off of real beer and actual intoxicating liquors under that guise, as well as of selling beverages dangerous to the public health, places the business of dealing in them under the guardianship and control of the police power. Therefore, while the municipalities in this State, under their general welfare clauses and in the absence of broader and express delegation of authority, may, as to the business of dealing in the class of beverages here under discussion, regulate only,

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and not prohibit, and while the regulation must be reasonable, and not arbitrary, yet regulations may be sustained as being reasonable, as applied to such occupations, which would be void for unreasonableness if they were made to relate to callings of a different nature." Citing a long list of decided cases as being in point.

Further on it is said: "Fundamentally the right to regulate the sale of intoxicating liquors differs only in degree from the right to regulate imitations and substitutes for such beverages, and especially those which approach closely to the borderline of being intoxicating. In general terms it may be said that municipal corporations, in dealing with the sale of 'near beer' and like beverages, may, under the general welfare clause, adopt all fair and appropriate regulations which would tend to prevent the business from becoming a nuisance by attracting together idle or disorderly persons, or by otherwise tending to disturb the public peace and tranquility, or from becoming a menace to health by reason of the sale of impure or unwholesome liquors, or from becoming a means of violating the law as to the sale or keeping of intoxicating liquors."

Again it is said in the opinion: "The argument that, since 'near beer' is not an intoxicating liquor, dealers in it should stand on the same footing as dealers in soda water and other similar beverages, well comports with the zeal and partizanship which is to be expected of counsel in the case; but we would stultify ourselves if we did not recognize an essential distinction and a well-marked difference between the two classes. Both businesses are in a certain sense alike legitimate; but there are many varieties of legitimate businesses. An occupation may be lawful and yet may be neither useful nor necessary—in fact, may have a harmful tendency."

In the light of the authorities cited it seems clear to us that the legislation here in question comes within the legitimate domain of the police power of the State, and, therefore, there is nothing in the contention of defendant in error that said section

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23½ is in conflict with section 8 of the Constitution of Virginia, which provides, that "no man shall be deprived of his life or liberty except by the law of the land or the judgment of his peers."

We are further of opinion that there is still less force in the contention that the legislation in question is in conflict with the fourteenth amendment to the Constitution of the United States, since section 23½ of the "Byrd Liquor Law" was passed in the legitimate exercise of the police power of the State, and, therefore, the fourteenth amendment to the Constitution of the United States has no application whatever.

A great number of cases might be cited in support of this view, but we shall be content with the citation of the following, which are to the effect that "The power of the State over police regulations is supreme. The legislature determines the necessity for, and the courts the proper subjects of its exercise: *Slaughter House Cases*, 83 U. S. 394, 21 L. E. 394; *Commonwealth v. Alger*, 7 Cush. (Mass.) 84; *Taunton v. Taylor*, 116 Mass. 254; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. Ed. 989; *Barbier v. Connolly*, 113 U. S. 27, 28 L. Ed. 923, 5 Sup. Ct. 357.

In the last-named case the opinion says: "But neither the amendment (14th), broad and comprehensive as it is, nor any other amendment, was designed to interfere with the power of the State, sometimes termed its 'police power,' to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the State, develop its resources and add to its wealth and prosperity."

In *Re Rahrer*, 140 U. S. 554, 35 L. Ed. 572, 11 Sup. Ct. 866, the opinion by Chief Justice Fuller says: "The power of the State to impose restraints and burdens upon persons and property in conservation and promotion of the public health, good order, and prosperity, is a power originally and always belonging to the States, not surrendered by them to the general gov-

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ernment, nor directly restrained by the Constitution of the United States, and essentially exclusive. And this court has uniformly recognized State legislation, legitimately for police purposes, as not, in the sense of the Constitution, necessarily infringing upon any right which has been confided expressly or by implication to the national government. The fourteenth amendment, in forbidding a State to make or enforce any law abridging the privileges and immunities of citizens of the United States, or to deprive any person of life, liberty or property without due process of law, or to deny any person within its jurisdiction the equal protection of the laws, did not invest, and did not attempt to invest, Congress with power to legislate upon subjects which are within the domain of State legislation."

Nor is there anything in the contention that section 23½ of the "Byrd Liquor Law" should be held to be in excess of the powers conferred by section 62 of the Constitution of Virginia. That section of the Constitution was not designed to limit the police power of the State, but to enlarge it, so as to give to the legislature the widest discretion in the selection of the means, mode and method of controlling, regulating or prohibiting the manufacture or sale of intoxicating liquors.

There are, perhaps, seeming inconsistencies in some of the provisions of the statute under consideration, but such inconsistencies, if such there be, are more properly to be dealt with by the legislature than by the courts. The power of the General Assembly is supreme, unless restricted by the State or Federal Constitution, and even if there be doubt as to the power, that doubt is to be solved in favor of the right to exercise the power. In other words, "We can declare an act of the General Assembly void only when such act, clearly and plainly, violates the Constitution, and in such manner as to leave no doubt or hesitation on our minds." *Commonwealth v. Moore & Goodson*, 25 Gratt. 951; *Button v. State Corp. Com.*, 105 Va. 634, 54 S. E. 769, and the authorities there cited.

The argument of counsel, that the legislature, in enacting

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section 23½ of the statute, under the guise of regulating the liquor traffic in this State, sought to do by indirection that which it could not do directly, namely, discriminate in favor of a few persons as against the other members of the community, has nothing in the record upon which to rest. That section of the statute is entirely consonant with the manifest intention of the entire enactment, and aimed at the regulation and control of the sale of intoxicating liquors in this State, and the purpose to discriminate in favor of a few persons as against other members of the community is nowhere apparent.

For the foregoing reasons and in view of the authorities cited, we are of opinion that the judgment of the Circuit Court of Frederick county, holding section 23½ of the act of the General Assembly above mentioned to be unconstitutional and void, is erroneous; and the said judgment will be reversed and annulled, and this court will proceed to enter such judgment as the circuit court should have entered.

In the second of the above-named cases the defendant in error, Charlie Shannon, was arrested, tried, convicted and fined \$500 by a justice of the peace of the county of Giles, upon a warrant charging him with unlawfully selling and delivering to one Joe Hight a certain mixture, preparation and liquid called "Pocahontas malt," which was the product of a brewing plant or brewery, and which in fact was "malt beverage" as defined by the law of the State of Virginia, the said Shannon not being the manufacturer of said malt beverage. In other words, that the said Shannon had been guilty of the violation of section 23½ of the "Byrd Liquor Law."

From the judgment of the justice Shannon took an appeal to the Circuit Court of Giles county, which court, a jury being waived, heard and tried the case on May 10, 1909, and thereupon found the defendant not guilty, upon the ground "that section 23½ of the Byrd Law, which prohibits the sale of such a beverage as the beverage in this case has proven to be, violates both the State and the Federal Constitution, as contended for by the defendant."

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It appears from the transcript of the record before us that every fact necessary to a conviction of Shannon of the violation of the provisions of section 23½ of the "Byrd Liquor Law" was proven. In fact, Shannon admitted the violation of the statute, and relied upon the defense that the said statute was unconstitutional and void, as was held by the learned judge of the circuit court.

For the reasons stated, and in view of the authorities cited in the above discussion of the case of *Commonwealth v. R. M. Henry*, we are of opinion that the Circuit Court of Giles county erred in its judgment that section 23½ of the act of the General Assembly above mentioned is unconstitutional and void; and the said judgment will be reversed and annulled, and this court will proceed to enter such judgment as the circuit court should have entered.

*Reversed.*

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Opinion.

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**Richmond.**

## EDMONSTON V. COMMONWEALTH.

November 26, 1909.

Absent, Buchanan, J.

1. WITNESSES—*Privilege—Self Incrimination—Limited Answer.*—A witness may decline to answer any question when the answer may tend to incriminate him. This privilege is guaranteed to him by the Constitution. Nor is the right to decline to answer at all affected by the suggestion of the judge that he might answer yes or no, without giving any reason for his answer.

Error to a judgment of the Circuit Court of Alexandria county.

*Reversed.*

The opinion states the case.

*S. G. Brent and Moncure & Tebbs*, for the plaintiff in error.

*Robert Catlett, Assistant to the Attorney General*, for the Commonwealth.

HARRISON, J., delivered the opinion of the court.

This is a writ of error to a judgment of the Circuit Court of Alexandria county, whereby the plaintiff in error was fined \$20.00 and sentenced to confinement in the county jail for a period of twenty days for contempt in refusing to answer questions propounded to him by the grand jury of the county.

It appears that the grand jury for the county of Alexandria was in session, and that it had under consideration the ques-



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tion of indicting the plaintiff in error and four other persons for playing, promoting, and setting up lotteries in the county. The result of this inquiry was the return of a true bill against one John C. Nelson and not a true bill against the other four, including the plaintiff in error. During the progress of this inquiry the plaintiff in error was summoned before the grand jury as a witness on behalf of the Commonwealth in the case of John C. Nelson, who was indicted. The grand jury propounded certain questions, which the witness declined to answer, upon the ground that in doing so he would incriminate himself. The refusal to answer was reported to the court and the witness there stated that, if he should answer the questions, his answer would result in an indictment and criminal prosecution of himself, and for that reason he had declined to answer. Thereupon the court required the witness to answer three of the questions, stating "that he could answer yes or no, and if in the affirmative he would be required to state how or why he knew it." The witness still refusing to answer, the judgment complained of was entered, imposing the fine and imprisonment already mentioned.

We are of opinion that, under the facts of this case, it was error for the circuit court to require the plaintiff in error to answer the questions propounded to him by the grand jury, and upon his failure to do so to fine and imprison him. It is well settled in this State that a witness can decline to answer a question when the answer may tend to incriminate himself—indeed, it is a privilege guaranteed him by the Constitution. There is not a suggestion in the record that the plaintiff in error was contumacious or acting in bad faith for the purpose of protecting the offender. On the contrary, his refusal to answer appears to have been for the sole and *bona fide* purpose of protecting himself from inevitable indictment and prosecution.

Nor was the right to decline to answer at all affected by the action of the court in limiting his answer to "yes" or "no." It is manifest from the form of the questions that nothing could be accomplished by obliging the witness to make such limited an-

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swers. The action of the court in requiring the plaintiff in error to make these monosyllabic answers was in effect a recognition of his right to refuse to answer fully the questions propounded by the grand jury.

This case is controlled by the decision of this court in the very similar case of *Temple v. Commonwealth*, 75 Va. 892. The questions here involved have there been fully and elaborately considered, and it is unnecessary to repeat here what is there said upon the subject.

The judgment complained of must be reversed and the contempt proceedings against the plaintiff in error dismissed.

*Reversed.*

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Opinion.

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**Richmond.**

## LILLY V. COMMONWEALTH.

November 26, 1909.

Absent, Buchanan, J.

*(For syllabus see Edmonston v. Commonwealth, ante, p. 897.)*

Error to a judgment of the Circuit Court of Alexandria county.

*Reversed.*

(For facts of case see *Edmonston v. Commonwealth, ante* p. 897.)

*S. G. Brent and Moncure & Tebbs*, for the plaintiff in error.

*Robert Catlett, Assistant to the Attorney General*, for the Commonwealth.

HARRISON, J., delivered the opinion of the court.

The case was heard with the case of *Edmonston v. Commonwealth*, in which an opinion has this day been handed down. The two cases are in all respects identical, and for the reasons given in *Edmonston's* case, the judgment here complained of must be reversed and the contempt proceedings against Charles Lilly dismissed.

*Reversed.*

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Opinion.

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**Richmond.****SAMUELS V. COMMONWEALTH.**

November 26, 1909.

Absent, Buchanan, J.

1. **WITNESSES—Disqualification—Perjury—Conviction in Federal Court—Testimony in State Court.**—A witness convicted of perjury in a United States court sitting in this State is not thereby disqualified from testifying in one of the courts of this State. The Federal statute expressly limits the disqualification to "giving testimony in any court of the United States," and the Virginia statute intended only to disqualify persons convicted of perjury in a court of this State. Neither the Federal statute nor the State statute intended to impose, or could impose, the punishment prescribed by the other.

Error to a judgment of the Corporation Court of the city of Danville.

*Reversed.*

The opinion states the case.

*Peatross & Harris*, for the plaintiff in error.

*Robert Catlett*, Assistant to the Attorney General, for the Commonwealth.

CARDWELL, J., delivered the opinion of the court.

W. B. Samuels was indicted in the Corporation Court of the city of Danville for murder, found guilty and sentenced to confinement in the penitentiary for a term of eighteen years. To that judgment this court awarded a writ of error.

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**Opinion.**

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There being, in our opinion, no merit in the other assignments of error to the rulings of the trial court, or it not being probable that the matters therein referred to will arise upon another trial, we will consider only the question presented on the second assignment, viz.: whether or not it was error to refuse plaintiff in error the right to testify in his own behalf.

This ruling of the trial court was grounded upon the proof adduced on behalf of the Commonwealth that plaintiff in error had been theretofore convicted in the District Court of the United States for the Western District of Virginia of perjury, and that by virtue of the Virginia statutes—sections 3742, 3743 and 3898 of Va. Code, 1904—he was disqualified to testify as a witness in the courts of this Commonwealth.

Conceding that the proof was competent and sufficient to prove the conviction of plaintiff in error of perjury in the Federal court, does that fact disqualify him as a witness in the courts of this Commonwealth?

The Federal statute—sec. 5392 of the Revised Statutes of the United States—defines what constitutes perjury under it, and how the offense shall be punished, adding to the punishment by fine and imprisonment, “and shall moreover thereafter be incapable of giving testimony in any court of the United States . . . .” By that statute the conviction of one for its violation incapacitates him to testify in the courts of the United States, i. e., in the Federal courts, and can be given no greater force or effect.

Section 3742 of the Virginia statute, *supra*, provides that if any person commit perjury on a trial for felony he shall be confined in the penitentiary not less than two nor more than ten years; and if it be on any other occasion he shall be confined in jail and fined. By section 3743 the further penalty is imposed of making any person so convicted incapable of holding any post mentioned in section 162 or of serving as a juror, or giving evidence as a witness, and section 3898 merely provides that “A person convicted of perjury shall not be a witness, although pardoned or punished.”

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We do not think it at all material that the Federal and State enactments impose different penalties for perjury, but do consider it conclusive of this case that the Federal statute was intended and has the effect only to disqualify persons convicted of perjury in the Federal courts to testify as a witness in the courts of the United States, i. e., in the Federal courts; and that the Virginia statutes were intended and have the effect only to disqualify persons convicted of perjury in a court of this State to testify as a witness thereafter in the courts of this State. The first section of the statute above mentioned clearly refers to perjury committed in the courts of this State; the second to post, i. e., offices, created and held under the laws of this State; and the third must necessarily have reference only to the capacity of a person to give evidence as a witness in the courts of this State. Had the legislature intended that the statute should have any other meaning or effect, doubtless it would by the use of apt words have made the intent plain and unmistakable and not left it to doubtful interpretation, since it is well settled that penal statutes are to be strictly construed, and cannot be enlarged or their effect extended by construction.

Very clearly neither the State statute nor the Federal statute contemplates imposing or could impose the punishment imposed by the other, nor can the courts of either take cognizance of or punish violations of the statutes of the other, for, as said *In Re Loney*, 134 U. S. 372, 33 L. Ed. 949, 10 Sup. Ct. 384, "neither the courts nor processes from the courts of one can be invoked to execute the judgments of the other."

In 1 Greenleaf on Evidence, sec. 376, the learned author says: "Whether judgment of an infamous crime, passed by a foreign tribunal, ought to be allowed to affect the competency of the party as a witness in the courts of this country is a question upon which jurists are not entirely agreed. But the weight of modern opinion seems to be that personal disqualifications, not arising from the law of nature, but from the positive law of the country, and especially such as are of a penal nature, are strictly

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territorial, and cannot be enforced in any country other than that in which they originated. Accordingly, it has been held, upon great consideration, that a conviction and sentence for a felony in one of the United States did not render the party incompetent as a witness in the courts of another State; though it might be shown in diminution of the credit due to his testimony."

1 Wigmore on Evidence, sec. 522.

It follows that the judgment in this case has to be reversed, the verdict of the jury set aside, and the cause remanded for a new trial to be had in accordance with this opinion.

*Reversed.*

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Opinion.

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**Richmond.****HARRIS V. COMMONWEALTH.**

November 30, 1909.

Absent, Buchanan, J.

1. **WITNESSES—Competency—Grand Juror.**—A grand juror may be called and examined on behalf of the accused to prove that the testimony of a witness called and examined on behalf of the Commonwealth on the trial of a case is in direct conflict, upon a material point, with the testimony given by that witness before the grand jury.

Error to a judgment of the Circuit Court of Fauquier county.

*Reversed.*

Error confessed.

*Richard E. Byrd and Marshall McCormick*, for the plaintiff in error.

*Wm. A. Anderson, Attorney General*, for the Commonwealth.

No opinion was delivered, but the following order was entered by the court:

This day came as well the plaintiff in error, by counsel, as the Attorney General on behalf of the Commonwealth; whereupon the said Attorney General, being of opinion that this court would be compelled to reverse the judgment of the Circuit Court of Fauquier county, rendered on the 2d day of October, 1909, upon the ground that the said circuit court erred in refusing to allow W. B. G. Shumate, foreman of the grand jury which



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found the indictment upon which the accused was tried, to be called as a witness on behalf of the accused to testify to statements made by Irvin Maxheimer when called as a witness before the grand jury, which were in direct conflict upon a material point with the testimony of said Maxheimer when he was called and examined as a witness for the Commonwealth on the trial of the case, on the ground that the proceedings of the grand jury were privileged, and that a member of the grand jury should not be allowed to testify as to any statements made before the grand jury by any witness called to testify before it, and the Attorney General and his assistant also being of the opinion that the rule indicated by Judge Moncure in *Little's Case*, 25 Gratt. 921, and approved in Massachusetts and other States, is the correct rule, deemed it their duty to confess error in this case upon that ground alone.

Therefore it is considered by the court that the said judgment be reversed and annulled, the verdict of the jury set aside, and a new trial awarded the plaintiff in error.

Which is ordered to be forthwith certified to the said Circuit Court of Fauquier county.

*Reversed.*

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Statement.

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**Richmond,**

## DIX V. COMMONWEALTH.

March 10, 1910.

Absent, Buchanan, J.

1. **CRIMINAL LAW—*Sale of Intoxicating Liquors—Indictment—Sufficiency.***—An indictment sufficiently notifies the accused of the charge brought against him when it charges that the defendant “within six months last past, in White Stone Magisterial District, in the county of Lancaster, did unlawfully sell and deliver intoxicating liquors and mixtures thereof, against the peace and dignity of the Commonwealth of Virginia.”
2. **CRIMINAL LAW—*Indictment—Election—Time for Making.***—It was not error in the case at bar to refuse to compel the prosecuting attorney to elect for which offense charged he would elect to prosecute before any evidence was introduced on behalf of the Commonwealth. This is a matter in the discretion of the trial judge, and, in the present case, it was properly exercised by postponing the election till after all the evidence for the Commonwealth had been introduced, but before the accused opened his defense.
3. **APPEAL AND ERROR—*Verdict Contrary to Evidence.***—A verdict of conviction in a criminal case cannot be set aside on a writ of error where there is sufficient evidence to support it. The plaintiff in error stands as on a demurrer to the evidence.
4. **CRIMINAL LAW—*New Trial—After-Discovered Evidence.***—A verdict will not be set aside for after-discovered evidence where it appears that the evidence was known to the accused during the progress of the trial, and that he did not ask for either delay or process to secure the attendance of the witness whose presence was desired.

Error to a judgment of the Circuit Court of Lancaster county.

*Affirmed.*

The opinion states the case.

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Opinion.

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*W. B. Sanders and T. J. Downing*, for the plaintiff in error.

*Robert Catlett, Assistant to Attorney General*, for the Commonwealth.

HARRISON, J., delivered the opinion of the court.

This writ of error is to a judgment against the plaintiff in error for unlawfully selling intoxicating liquors.

We are of opinion that the circuit court did not err in overruling the demurrer to the indictment and the motion to quash the same upon the ground that it fails to give the accused notice of the charge against him. The indictment sets forth "that Frank Dix, within six months last past, in White Stone Magisterial District, in the county of Lancaster, did unlawfully sell and deliver intoxicating liquors and mixtures thereof, against the peace and dignity of the Commonwealth of Virginia." The sufficiency of this indictment has been sustained by repeated decisions of this court. *Fletcher's Case*, 106 Va. 840, 56 S. E. 149; *White's Case*, 107 Va. 901, 59 S. E. 1101; *Runde's Case*, 108 Va. 873, 61 S. E. 792.

We are further of opinion that there was no error in overruling the motion of the defendant, asking that the Commonwealth be required to elect some specific sale before the introduction of any testimony on behalf of the Commonwealth.

This question has been considered and settled by *Hatcher's Case*, 106 Va. 831, 55 S. E. 677. It is there said, citing Bishop's New Crim. Proc., sec. 462: "The better view seems to be that that question should be left to the discretion of the trial judge, to be exercised with reference to the special facts of the case; but as Mr. Bishop says, whatever is done at the earlier stages of the trial, plainly, as a general rule, the election should be required before the prisoner opens his defense."

The record here shows that, at the conclusion of the Commonwealth's evidence, the court, in the exercise of its discretion,

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required the prosecuting attorney to specify the offense for which he would ask a conviction. This was done, and it was upon the specific offense then indicated that the conviction was had. In this the court followed the general rule of practice established in *Hatcher's Case*, and the record furnishes no ground for making this case an exception to that rule.

We are further of opinion that there was no error in the court's refusal to set the verdict of the jury aside as contrary to the law and the evidence. The case is before this court as upon a demurrer to the evidence, and under that rule the evidence is ample to sustain the conviction.

We are further of opinion that there was no error in refusing to grant a new trial upon the ground of after-discovered evidence. The record shows that the evidence relied on in support of this motion was known to the accused during the progress of the trial, and that he did not ask for either delay or process to secure the attendance of the witness whose presence was desired. Not until after the verdict was rendered was the materiality of this witness suggested.

There is no error in the judgment complained of, and it must be affirmed.

*Affirmed.*

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**Syllabus.**

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**Richmond.****HARDY v. COMMONWEALTH.**

March 10, 1910.

Absent, Buchanan, J.

1. **CRIMINAL LAW—*Venire Facias*—*Summoning Entire List*.**—Where the order for a writ of *venire facias* in a felony case conforms to the requirements of section 4018 of the Code, both as to the number of names to be drawn and the number of persons to be summoned, the writ will not be quashed merely because it directs the sheriff to summon the entire list drawn, instead of four less than that number, in the absence of any evidence that the accused was, or could have been prejudiced thereby.
2. **CRIMINAL LAW—*Venire Facias*—Code Section 4018—*Number of Jurors to be Summoned*.**—The provision of section 4018 of the Code requiring that the number of persons drawn from the box in a felony case should not be more than four in excess of the number to be summoned, was clearly not intended as a protection to the party to be tried, but to give the sheriff a certain discretion to be used if he did not summon all the jurors drawn, provided the number not summoned did not exceed four.
3. **CRIMINAL LAW—*Trial for Murder—Evidence—Ill Feeling of Deceased—Communication to Accused*.**—On a trial for murder, it is entirely proper and material to show that the purpose of the deceased to prosecute the accused for a violation of the criminal laws of the State was communicated to the accused before the murder of the deceased.
4. **CRIMINAL LAW—*Murder—Evidence—Feelings of Parties Toward Each Other—Purpose of Deceased—Partial Communication to Accused*.**—On a charge of murder, it is proper to introduce in evidence facts which tend to show the state of feeling existing between the deceased and the accused, and that it was the settled purpose of the deceased to have the accused prosecuted and punished for a violation of the criminal laws of the State, although all that was said to the witness was not communicated to the accused.

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5. **CRIMINAL LAW—Evidence—Conditional Threats.**—On a charge of murder, conditional threats made by the accused are admissible in evidence wherever it is shown that the deceased had put himself within the condition laid down by the accused. It is not necessary that the person killed should have been named, when the facts and circumstances make it clear that he was the party intended.
6. **CRIMINAL LAW—Evidence—Indefinite Threats.**—Upon proof of indefinite threats, as that the accused "was going to kill him," without naming anyone, it is for the jury to determine from all the facts and circumstances to whom the threat referred.
7. **CRIMINAL LAW—Evidence—Admissibility—General Objection.**—A general objection to testimony, some of which is proper and some not, should be overruled.
8. **CRIMINAL LAW—Circumstantial Evidence—Latitude in Presentation.** Where the evidence to identify an assassin is purely circumstantial, greater latitude is allowed in its presentation than if it were direct and positive. The jury should have before them every fact which will enable them to come to a satisfactory conclusion.
9. **CRIMINAL LAW—Evidence—Express Threats—Impersonal and Conditional Threats.**—Where definite, express, personal and malignant threats have been proved to have been made by one indicted for murder, with direct reference to the deceased, evidence of other impersonal and conditional threats, and of the ill-feeling existing between the deceased and the accused should be allowed to go to the jury, to be considered by them, along with other threats proved in the case, and given such weight in connection therewith as the jury think it deserves.
10. **CRIMINAL LAW—Evidence—State of Feeling Between Parties—Circumstantial Evidence of Guilt of Accused.**—Evidence as to the state of feeling existing between the accused and the victim of a murder is not restricted to cases where it has been shown that the accused committed the crime. It may also be received where the evidence tends to prove that the accused was the perpetrator of the crime.
11. **CRIMINAL LAW—Murder—Evidence to Show State of Feeling Between Deceased and Accused.**—On an indictment for murder, evidence of a detective that the deceased, shortly before his death, employed him to hunt up evidence that accused was selling liquor illegally, with a view to prosecuting the accused therefor, but that he found none, is admissible for the purpose of showing the state of feeling existing between the deceased and accused.
12. **EVIDENCE—Books of Original Entry—When Admissible.**—A book of entries, in which an entry is made in the usual course of business, at the time of the transaction, of matters within the personal knowledge of the bookkeeper, is admissible in evidence to

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**Syllabus.**

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show to whom goods were sold, where the bookkeeper is beyond the jurisdiction of the trial court.

13. **CRIMINAL LAW—Witnesses—Surprise—Prior Inconsistent Statements—Code, Section 3351.**—Under the provisions of section 3351 of the Code (1904), a witness introduced by the Commonwealth having turned out to be adverse, and his evidence having taken the Commonwealth by surprise, it was proper, after laying the foundation therefor, to prove a prior inconsistent statement made by him, and to instruct the jury that his evidence, so far as it contradicted any statement of any witness introduced by the defense, was proper rebuttal, and that the evidence of his prior inconsistent statement only went to his credibility, and affected his veracity and truthfulness.
14. **CRIMINAL LAW—Misconduct of Jury—Attending Picture Show.**—A verdict of guilty in a murder trial will not be set aside simply because the jury in charge of officers of the court were permitted to attend a moving picture show of a somewhat tragic character, but bearing no similarity to the case on trial, and where the jury could not possibly have been affected or influenced by seeing it. It is indiscreet, however, for officers of the court in charge of the jury to attend such performances, even though they occupy a separate gallery and have no communication whatever with outsiders, and such conduct is highly censurable.
15. **CRIMINAL LAW—New Trial—Facts Known to Counsel During Trial—Failure to Object.**—A prisoner cannot go forward with the trial of his case and take his chances of success, and, after he has been found guilty, seek a new trial on the ground that the jury attended a moving picture show, when his counsel knew that they had attended the show before the case was submitted to them, and yet, with that knowledge, raised no objection to their alleged misconduct.
16. **CRIMINAL LAW—Evidence—Alibi—Use of Unsatisfactory Evidence—Effect.**—Where circumstantial evidence tends strongly to prove that the prisoner is guilty of the murder of which he is accused, his effort to prove, by unsatisfactory evidence, an *alibi*, or that he was not the owner of the gun with which the murder was committed, at the time of its commission, leaves him in a worse condition than if he had not made the effort.
17. **CRIMINAL LAW—Evidence—Conduct of Accused.**—The conduct of one accused of crime, after its commission becomes known, is a circumstance to be considered on his trial for the crime.
18. **CRIMINAL LAW—Conflicting Evidence—Verdict.**—Although the evidence in a criminal case presents conflicts and inconsistent statements of witnesses, the jury are the sole judges of the facts which the evidence tends to prove, and of the inferences and conclu-

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sions to be drawn therefrom, and their verdict will not be set aside unless it is against the law, or is contrary to the evidence, or is without evidence to support it.

Error to a judgment of the Circuit Court of Nansemond county.

*Affirmed.*

The opinion states the case.

*Thos. H. Willcox* and *Hill Carter*, for the plaintiff in error.

*Wm. A. Anderson*, *Attorney General*, for the Commonwealth.

CARDWELL, J., delivered the opinion of the court.

Samuel Hardy was indicted in the Circuit Court of Nansemond county for the murder of Tiberius Gracchus Jones (spoken of in the record as "Grac." Jones), was found guilty of murder in the first degree, and sentenced to be electrocuted. To this judgment of the circuit court a writ of error was awarded by a judge of this court.

It appears that the deceased, in company with his next door neighbor, one J. H. Joyner, returned on the railroad train, from a trip to Suffolk, to the town of Holland, near which town in Nansemond county he lived, a little after nine o'clock P. M. October 26, 1908, and after lingering a short time in Holland near the office of a justice of the peace, who was engaged in the trial of a criminal case, he and Joyner left for their homes, walking together till the pathway or road to Joyner's home was reached, and then the deceased proceeded in the direction of his own home near by. About 10:30 o'clock P. M., just after deceased had gotten inside his inclosure, entering through what is generally spoken of as the eastern gate, he was shot down by some person or persons lying in wait, receiving two wounds in the abdomen, made with No. 6 shot fired from a shotgun at short range, and three wounds made by bullets fired from a



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pistol. The shots from both the gun and the pistol were in rapid succession, and both wounds were necessarily fatal, and from them the murdered man died within two or three hours.

Joyner, who was not far away, and who not only heard the shooting, but heard the deceased exclaim "You scoundrel!" was the first person to reach the deceased, who exclaimed as he approached, "Joyner, they have killed me for telling the truth," and afterwards remarked, that he thought "Sam Hardy or Luke did it." Still later, when conscious of impending and certain death, he said, that "it was so dark that he could not see, but thought it was Sam Hardy."

The physicians attending the wounded man did not find either of the pistol bullets in the body of the deceased, but did find in one of the wounds the wad of a cartridge which bore upon it the stamp of the Union Metallic Cartridge Co., "No. 6 shot, 3 drams powder," just such a wad as was used in shells shot from a No. 12-bore Ithaca shotgun, and just such a gun as Sam Hardy, the accused, owned and had in his possession certainly up to a few days before this murder. The pistol used by the assassin was, as near as could be told from the wounds it made, a 32 calibre, just such a pistol as the accused owned, and as was shown to have been put by him into his pocket on the night of the murder as he was leaving his store, and not over two hours before the murder.

It further appears that the accused and the deceased, who had lived for some years within less than a mile of each other, had been friends until within a few months before the murder of the deceased, when they became exceedingly unfriendly, in fact, bitterly hostile; the deceased having charged the accused with selling liquor without a license, and openly and in unqualified terms charged him with perjury in the testimony which he had given in a will case just six days previous to the murder of the deceased; and that deceased had not only declared it to be his purpose to prosecute the accused for the illicit sale of liquor, but also for perjury, and had on the very

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day he was assassinated gone to Suffolk to consult an attorney with respect to the institution of such prosecutions. It also appears, as we will see later, that the accused knew what were the declarations and purposes of the deceased in respect to his prosecution for illicit traffic in liquor, but what was very much more serious to him a prosecution for perjury, and he doubtless knew that the charge of perjury could not be maintained without the evidence of the deceased.

It was furthermore shown in the evidence that the accused (Hardy) cherished feelings of intense hostility towards the deceased for some time prior to his death; and that he had made repeated and malignant threats against his life.

Early in the morning following the murder there was found near where the deceased had fallen and was lying when Joyner found him, the forearm of a Ithaca shotgun, which had doubtless bounded from the gun which fired the fatal shots at the deceased—a forearm of just such a shotgun as the accused owned.

Taking up in their order the errors assigned on behalf of the accused, we come first to the question whether or not the trial court erred in overruling the motion of the accused to quash the writ of *venire facias*.

Pursuant to the statute (section 4018, Code 1904) the judge of the circuit court directed more than twenty names to be drawn and placed in the list, and more than sixteen to be summoned—i. e., the order entered, “for good cause shown,” directed that forty persons be drawn, at least thirty-six of whom should be summoned. Thereupon the clerk issued the writ of *venire facias*, directing the sheriff to summon the entire forty so drawn, and the failure of the clerk to direct the summoning of thirty-six instead of the entire forty is the ground of the motion of the accused to quash the writ.

That part of section 4018 of the Code, *supra*, which is pertinent here is as follows: “For good cause shown in any felony case the judge of the court, in term time or vacation, may di-

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rect more than twenty names to be drawn and placed in the list, and more than sixteen persons to be summoned. He shall in such case specify the number of names to be drawn and the number of persons to be summoned; the number drawn shall not be more than four in excess of the number to be summoned."

That the clerk in this case proceeded strictly in the manner prescribed in the statute to draw forty names from the jury box, which he placed in the list which he delivered to the sheriff, is not questioned. Therefore the sole question is, was the issuing by the clerk of the writ of *venire facias* directing the sheriff to summon the entire list so drawn such a departure from the mandatory and imperative requirements of the statute as prejudiced, or might have been prejudicial to, the accused.

The motion to quash the writ was made in due time, but it is nowhere pointed out that the accused was or might have been prejudiced by the writ directing the summoning of the entire forty instead of only thirty-six of the persons named in the list; nor does there occur to us any reason for supposing that this irregularity of the clerk, if indeed it could be considered an irregularity, could have by any possibility been prejudicial to the accused.

To sustain the contention of the accused, the case of *Jones v. Commonwealth*, 100 Va. 842, 47 S. E. 951, and *Hoback v. Commonwealth*, 104 Va. 871, 52 S. E. 575, are greatly relied on, but in our view of those cases they are not authority for the proposition the accused is contending for. In the first of those cases the clerk issued a writ of *venire facias* commanding the officer to summon twenty-four persons of his county, instead of sixteen as the statute and the order of the court required; and it was held that the mandatory and imperative provisions of the statute had not been complied with, and that the writ of *venire facias* should have been quashed. Subsequently the statute was amended, with the evident intent of reducing technical objections in criminal cases to the minimum. See Acts 1902-3-4, p. 882; Acts 1904, p. 16.

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In the *Hoback Case*, *supra*, the method actually followed in summoning the *venire* was in direct contravention of the mandatory provisions of the statute for the protection of the prisoner, and a guaranty to him of a jury uninfluenced by the will, caprice, or personal preference of any officer of the court. Therefore the second and third as well as the first writ were quashed. That case was wholly different from this. It cannot be contended with any degree of force, as it appears to us, that because the sheriff in this case was directed to and did summon the entire panel of forty, the accused was deprived of the privilege of exercising his option of striking as many as four from the panel, or any error committed of which he could complain.

We concur in the opinion of the learned judge below that the provisions of the statute, requiring that the number of persons drawn from the box should not be more than four in excess of the number summoned, was clearly not intended as a protection to the party to be tried, but to give the sheriff a certain discretion to be used for his benefit and convenience, to the end that he might be excused if he did not summon all of the jurors drawn, provided the number not summoned was not greater than four. In the very nature of things, the mere irregularity complained of in this case did not and could not have prejudiced the accused, and, therefore, the refusal of the trial court to quash the writ of *venire facias* is without error.

The second assignment of error presents the question whether or not the court erred in permitting, over the protest and objection of the accused, the testimony of the witness, J. H. Joyner, to go to the jury.

The only ground upon which the objection to the testimony of this witness could rest at all is that a part of it relates to matters not communicated to the accused.

By way of introduction this witness did make immaterial statements, but it does not appear to us that any part of his testimony was, in a legal sense, prejudicial to the accused. The accused had made vicious and violent threats, showing unmistak-

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ably a deadly hostility on his part toward the deceased, some of which threats were more or less impersonal, and some of them conditional, but all tending to show "malice," either general or special, toward the deceased; all of these threats tending to show, also, the intent of his mind towards the deceased, or towards anyone who would dare to prosecute him for a criminal violation of the liquor laws, after having claimed to be his friend, so as to cause him to lose a large sum of money, and the testimony of Joyner was entirely proper and material to prove that the purpose of the deceased to prosecute the accused was communicated to the accused before the murder of the deceased. Joyner testified that on the very day this murder was committed he (Joyner) had told the accused that "Mr. Jones was going to prosecute him for selling liquor without a license"; that "he had as well get ready to pay the fine," and that he (Hardy) "had just as well get ready to pay a fine for selling liquor without a license, because Mr. Jones had him faded." Whether all the facts testified to by Joyner were communicated to the accused or not, they were, in our opinion, facts which were proper to introduce into the case for the purpose of showing the state of feeling existing between the deceased and the accused, and of showing the apprehension of the accused that it was the settled purpose of the deceased to have him prosecuted and punished for both the illicit sale of liquor and perjury.

The third assignment of error is the admission of testimony of the witnesses Jesse Copeland, Claude Norfleet, and Joseph I. Johnson, who testified to certain threats made by the accused, of an alleged vague, indefinite or conditional character.

The statement of Johnson is: "I heard him (accused) say the day he went home from here on the will case that he would have killed him on that day if he had opened his lips to him." "He did not say much about the will. He cursed and quarreled over it some and said he was going to kill Grac. Jones, damn him." Copeland testified that the accused had said in his presence "that if a man was to report him in this low, underhand

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means of pretending to be friendly with him, and come in and buy whiskey and then go out and report him and get him into court and trouble, he would kill him for it"; that "he did not mean any man that might report him, or any man that would be a witness, but a party that would underminingly, as he called it, buy whiskey from him."

It is true that the threat testified to by Copeland was a general threat, and in a sense a conditional threat, and was made some time before this murder, but it tended to show a purpose in the mind of the accused to kill any man who should subject him to prosecution and fine for the illicit sale of liquor.

As we have seen, the deceased, at the time of his death and prior, was engaged in putting in motion against the accused the machinery of the law to punish him for selling liquor without a license, and the accused had been informed a few hours before deceased met his death that he (deceased) had the evidence on him (the accused) and was going to prosecute him.

The authorities, so far as we have been able to examine them, unmistakably hold that conditional threats are admissible, wherever it is shown that the party who has been attacked had put himself within the conditions laid down by the party making the threats.

The rule as to admissibility of such evidence is well stated in 21 Cyc. p. 922, under the head of "*Indefinite, Impersonal and Conditional Threats*, as follows: "A threat to kill or injure someone not definitely designated is admissible in evidence where other facts adduced give individuation to it; but general threats not shown to have any reference to the deceased cannot be proved. So also words uttered under such circumstances as *prima facie* to import a threat are admissible. The fact that the threat made was conditional, or was immediately retracted, does not affect its admissibility."

"Nor is it necessary to name the threatened party when the facts and circumstances make it clear that the deceased was the party intended." *Mathis v. State*, 34 Tex. Crim. R. 39, 28 S.

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W. 817; *Hardy v. State*, 31 Tex. Crim. R. 289, 20 S. W. 561; *Cribbs v. State*, 86 Ala. 613, 6 South. 109.

Norfleet's testimony excepted to was that a year or two before the trial the accused, in witness' hearing, remarked that if anyone was to indict him and cause him to pay out a whole parcel of money, he would kill him. With respect to this witness it is only necessary to observe here that witnesses not unfrequently overestimate the lapse of time, and the jury might well have considered from all the evidence in the case that this remark of the accused in the presence of Norfleet was not anything like two years, or even a year, before the murder of the deceased. The testimony of this witness was entirely competent to show the ill-feeling existing between the deceased and the accused for some time, perhaps a year, prior to the murder of the deceased.

Joseph I. Johnson testified that about a week before the killing of the deceased he heard the accused say: "All right." "If things turned out like they looked, he was going to kill him, damn him." Now both Joyner and Johnson clearly appear to be reluctant witnesses against the accused, and though Johnson said that he did not know whom the accused was talking about, "whether a man, or a snake, or a mule, or who," it was within the province of the jury to determine the facts and to draw reasonable inferences therefrom; and it is perfectly evident that the jury understood from the language of the accused, testified to by Johnson, that he referred to some man, and were warranted from all the evidence adduced in the conclusion that he referred to his avowed enemy, the deceased.

R. W. Withers, on behalf of the Commonwealth, testified that on the afternoon of the murder of the deceased, which occurred as stated between ten and eleven o'clock P. M., deceased came to Suffolk and inquired of witness why he did not proceed to prosecute the accused (Hardy) for selling liquor without a license and for perjury, claimed by the deceased to have been committed by the accused in his testimony with reference



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to the will of Z T. Holland, which testimony of the accused had been taken before a notary some five or six days prior to this conversation between the witness, Withers, and the deceased. Withers testified to no threat made by the deceased, but only to the effect that the deceased entertained feelings of revenge and ill-will towards the accused. The witness also testified in respect to facts and circumstances immediately preceding the murder, tending to show the animus of the deceased towards the accused, and it may be that if there had been no other evidence in connection with the statements of the witness, bringing home to the accused knowledge of the deceased's feelings towards him, there would be force in the position that this evidence of Withers was inadmissible; but it is to be borne in mind that the accused was told by Joyner on the very day of the murder that the deceased was going to prosecute him for selling liquor, and was also told between October 20 and 26, the day of the murder, that Jones was going to prosecute him for perjury. Moreover, a material part of Withers' testimony, where he testifies as to what the deceased said and did on the 20th of October, six days before the murder, as to the purpose of the deceased to prosecute the accused for selling liquor and for perjury, is corroborated by the accused's own witness, B. R. Doughtie, who stated that he saw and conversed with the accused on his return from Suffolk the evening of the 20th, and that the accused said, among other things, that at the taking of his testimony touching the Holland will, Mr. Grac. Jones (deceased) was sitting near by, and every time he (accused) would say anything he could hear him (Grac. Jones) say in a low tone, "That is a lie."

The testimony of Withers, to a considerable extent, is not very material, but was not incompetent, while the other facts he testified to were admissible, as the lower court properly held, as tending to show the state of feeling existing between the accused and the deceased just prior to the killing of the latter. Moreover, the objection made to Withers' testimony



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is in general terms, without pointing out the objectionable parts; and it is well settled by numerous decisions of this court that where exception to the testimony is general and where a portion of the testimony is proper and a portion improper, the court should overrule the exception. See *Trogden's Case*, 16 Gratt. 64; *Sulphur Mines Co. v. Thompson*, 93 Va. 293, 25 S. E. 232; *N. & W. Ry. Co. v. Sutherland*, 105 Va. 545, 54 S. E. 465, and authorities cited in those cases.

It is very true that some of the threats of the accused which were testified to by Joyner and others were impersonal or conditional, but clearly, as the authorities show, they were competent for the purpose of showing general malice on the part of the accused, particularly when taken in connection with the other definite, express, personal and malignant threats made by the accused with direct reference to the deceased, established beyond question by the testimony of the same or other witnesses in the case.

"Greater latitude is allowed in the presentation of evidence where it is purely circumstantial than would be admissible where it is sought to establish the contention upon direct and positive testimony. In the reception of circumstantial evidence great latitude must be allowed. The jury should have before them every fact which will enable them to elucidate the transaction and to come to a satisfactory conclusion. However remote or insignificant a fact may be, if it tends to establish a probability or improbability of a fact in issue, to make it more or less probable, it is admissible." 3 Cyc. p. 110.

Direct evidence can rarely, if ever, be produced in a case like this, where the assassination is in secret, in the darkness of the night, and where no human eye, not even the unfortunate victim, could see the hidden foe, and of necessity, from the very nature of the case, the crime can only be proved by circumstantial evidence. If this were not a correct and an established rule of evidence, many of the most atrocious crimes known to society would go unpunished, and society be illy protected, es-

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pecially against such shocking and dastardly murders as we are now dealing with.

The facts proven in this case are: That bitter feelings existed between the accused and the deceased; that deceased, just prior to his death, had been talking freely about the accused on the streets of Holland and elsewhere. He did not pick his men to talk to about accused, but talked "open and above board," and that too, in a small town where the accused was a prominent business man. The accused had just testified in the will case, at which time the deceased was sitting behind opposing counsel prompting him as to the line of attack, and was heard by the accused frequently to say in an undertone, "That's a lie," when the accused was testifying. That the accused had on numerous occasions stated that any person who had once been his friend and afterwards turned against him, informing on him for selling liquors without a license he would kill; that he knew that the deceased was informing on him both as to the selling of liquor and as to the still graver charge of perjury; that the accused had said to several people just prior to the killing of the deceased that he "was going to kill Grac. Jones, damn him"; that "If Jones came in his store he would kill him"; that he would "give \$50.00 to have Jones alone in the Dismal Swamp, and work nights to make the money"; that "Jones had spoken to him at church where he had the advantage of him, but his (accused's) time was coming."

With these facts proven by uncontradicted evidence it is clear to us that the statements of Copeland, Norfleet, Johnson and Withers were properly allowed to go to the jury, to be considered, as they were told, along with all the threats proven in the case, and to be given such weight in connection therewith as the jury felt it deserved. Supporting the ruling of the trial court admitting the testimony of these witnesses are numerous cases cited in the opinion of the learned judge below, which is before us, from the States of Alabama, Georgia, Indiana, Missouri, Montana, Nevada, Ohio, Pennsylvania and Texas, and

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also cases decided by this court, viz.: *Snodgrass' Case*, 89 Va. 679, 17 S. E. 238; *Muscoe's Case*, 87 Va. 460, 12 S. E. 790. See also 21 A. & E. Enc. L. 220, and authorities there cited.

The learned counsel for the accused in this case seem to contend for the view that evidence as to the state of feeling existing between the accused and the victim of a murder can only be admitted after it is shown that the accused committed the crime; but the authorities by no means sustain this view.

A case in point is *Keener v. State*, 18 Ga. 228, 63 Am. Dec. 269, where the court said: "The true distinction, we apprehend, as to the admissibility of evidence of threats, and one apparently overlooked in many of the cases, is this: When sought to be introduced by the defendant as a justification for the homicide, and without any overt act, he must show that they have been communicated; otherwise, they can furnish no excuse for his conduct; but when offered to prove a substantial fact, viz.: the state of feeling entertained by deceased toward the accused, it is competent testimony, whether a knowledge of the threats be brought home to the defendant or not. When the fact of homicide is admitted or established by the evidence, circumstances showing the temper and conduct of the parties and illustrating their feelings towards each other previous to the fatal meeting are admissible in evidence as tending to throw light on the question of malice and intent." 21 Cyc. 892. *Dean's Case*, 32 Gratt. 912.

The same principle is recognized by this court in *O'Boyles' Case*, 100 Va. 785, 40 S. E. 121, where the opinion by Keith, P., says: "The evidence objected to was not admitted as tending to prove the perpetration of the crime with which the prisoner was charged, but for the purpose of showing the relation between the parties, their state of feelings and course of conduct towards each other, and as reflecting light upon the motive and intent with which the act was done."

To review here the numerous authorities cited by the learned counsel for the accused would needlessly prolong this opinion,

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since our examination of them leads either to the conclusion that they do not sustain the view contended for, or are in conflict with the great weight of authority, and, therefore, could not be given our approval.

Exception is taken to the testimony of the witness C. E. Everett, who was a detective of Norfolk, Va., and testified that a short while before this murder he was employed by the deceased (Jones) to go to the town of Holland for the purpose of getting up evidence with the view of prosecuting the accused (Hardy) for selling liquor illegally. The ground of objection to this evidence is that the visits of Everett and his efforts to get up evidence wanted by the deceased were not known to the accused, and, therefore, could not have prompted a motive in him to commit the crime with which he stood charged.

In answer to this exception we deem it only necessary to say that it would be difficult to perceive how the evidence of Everett could have done more than produce upon the minds of the jury the impression that the deceased entertained intensely bitter and revengeful feeling towards the accused. There is nothing whatever in the evidence given by the witness which indicated, or even suggested to the jury that the accused was guilty of the charge for which he was then being tried. On the contrary, if the evidence of the witness made any impression on the jury, it must have been favorable to the accused, for the reason that the witness stated that he found in his investigation no evidence of guilt against the accused, and the jury were told that this evidence was admitted for the sole purpose of showing the feelings between the deceased and the accused. The authorities we have cited abundantly sustain the ruling of the trial court in admitting the evidence of this witness.

Another assignment of error is the admission of the testimony of witness P. S. Livermore, treasurer of the Ithaca Gun Co., to prove an original entry upon the regularly kept books of that company. The witness proved that the sales book of the Ithaca Gun Co. produced at the trial, showing the records of ship-

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ments made by that company from the 30th day of October, 1906, to the 18th day of September, 1907, was a book containing original entries. In other words, it was proved that the sales book was in fact one of the books regularly kept by the Ithaca Gun Co., and used for the purpose of making just such entries and records as appeared therein. Very true the bookkeeper who made the entry proved in this case did not testify on the trial, but it is also true that the bookkeeper's attendance could not be enforced, as he was beyond the jurisdiction of the trial court. The book produced in this instance was certainly a book of equal authenticity with an ordinary book of accounts, and this court held as far back as the cases of *Downer v. Morrison*, 2 Gratt. 250, and *Hampton, &c. v. Michael*, 6 Gratt. 151, that "copies of original entries on plaintiff's books were competent evidence to show to whom goods were sold." Here not a copy of the entry but the original book of entry was produced and authenticated by an officer of the company.

The case of *Vinal v. Gilman*, 21 W. Va. 301, 45 Am. Rep. 562, is directly in point, in which it was held, that "A book of original entries, in which an entry is made in the usual course of business, at the time of the transaction, of matters within the personal knowledge of the bookkeeper, is admissible if the bookkeeper be dead at the time of trial, or be a non-resident, or cannot be produced as a witness on account of insanity or other cause."

We are of opinion that the testimony given by Livermore, to the effect that the Ithaca Gun Co. sold and shipped to the Leonard Hardware Co., on June 29, 1907, a certain lot of guns, among which was a gun having upon its fore-arm the same number on the fore-arm of an Ithaca gun picked up near where the victim of this murder was found lying, was properly admitted in evidence as tending to prove a fact to be considered by the jury along with the other facts and circumstances which the evidence adduced tended to prove, viz., that one of these guns was afterwards owned by the accused and was in his possession shortly before this murder.

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In the course of the trial J. U. Burges was permitted to testify as to inconsistent statements of one Everett Holland, a witness called for the Commonwealth, and to discredit the testimony of that witness. This ruling of the trial court is assigned as error.

It clearly appears in the record that the course of procedure adopted by the attorney for the Commonwealth in respect to the summoning, examination and impeachment of the witness, Everett Holland, conformed to the requirements of section 3351 of the Code of 1904, and has the approval of this court in *McCue's Case*, 103 Va. 870, 49 S. E. 623. Here both of the conditions upon which the contradiction and impeachment of a witness by the party who called him is permissible, were shown to exist. The witness, Holland, turned out to be adverse to the Commonwealth, and the attorney for the Commonwealth was "surprised" by the evidence he gave in, as was stated by Mr. Burges. In this connection the court properly instructed the jury that the evidence of Everett Holland, so far as it contradicted any statement of any witness introduced by the defense, was proper rebuttal, and so far as it showed he had made different statements to Mr. Burges, "it can only go to his (Holland's) credibility, and affect his veracity and truthfulness." This, the accused's seventh assignment of error, is also without merit.

The eighth assignment of error relates to the refusal of the court to set aside the verdict of the jury, because the jury had been permitted by the officers of the court, during the trial, to attend a moving picture show.

It appears that the jury, in company with two deputy sheriffs, on two nights during the trial, were allowed to go in a body and occupy one of the galleries of a room in which the moving pictures were exhibited; that this gallery was used exclusively by the jury and the deputies, and that no person communicated with them while in attendance upon the show; nor is it contended that any wrong was purposely committed

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by anyone connected with the visit to this entertainment, but it seems to be conceded that all were acting in the best of faith.

It is contended, however, by counsel for the accused, that as the pictures exhibited at the show were a reproduction of a tragedy called "Vengeance in Normandy," wherein two suitors for the hand of a lady quarreled and one of them lay in wait along a road near the home of the lady, attacked his rival with a dagger and felled him to the ground, the attack, however, not proving fatal, this exhibition was calculated to influence and inflame the minds of the jury by reason of its similarity to the case which they were trying, and that the scenes on the canvas were calculated to unduly impress them with the horror of the crime, and to prejudice their minds, unconsciously it might be, against the accused.

We fail to appreciate the similarity of the exhibition witnessed by the jury to the case they were trying, but do recognize the indiscretion on the part of the officers of the court in charge of the jury, and their conduct is highly censurable. The question, however, to be determined here is: Has the accused been prejudiced by the misconduct of the officers in permitting, and of the jury in attending, the picture show, of which he only complained after the jury had rendered their verdict, although he knew before the conclusion of the trial that the jury had been attending the show? As already stated, there was no communication made to the jury bearing directly or indirectly upon the issue of the guilt or innocence of the accused, and we have searched in vain the record for a fact or circumstance in this connection prejudicial to the accused. The fact that the jury saw a picture of a somewhat tragic character falls far short of reasonable ground of objection to their verdict. Nowhere in the record does it appear that any member of the jury was influenced or affected in any way, or could by possibility have been influenced or affected by seeing the picture show. On the contrary, the positive and uncontradicted proof, taken after the trial had ended, demonstrates not only that



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no member of the jury was directly or indirectly prejudiced against the accused by seeing the picture referred to, but that not the slightest impression affecting the case which they were to try was made, or could have been made, by anything that appeared upon the picture.

The foregoing facts as to the jury not having been communicated with or affected in any way prejudicial to the accused by their attendance upon the picture show are borne out by the affidavits of the deputy sheriffs who had charge of the jury, and by each member of the jury themselves, read to and considered by the court on the motion to set aside the verdict because the jury had attended the picture show. No case can be found, we believe, where it is held that a verdict of a jury should be set aside upon the facts shown in this case touching the attendance of the jury on the picture exhibition. Of course, as the authorities hold, where the jury or some member of it was in some way subjected to influence which would be calculated to influence them in coming to a verdict, the verdict should be set aside; but the mere sight or hearing of things which were harmless and innocent, and which had no connection with the case they were trying, and could have no bearing or influence upon their verdict, will not serve to invalidate their verdict.

This view is sanctioned by *Thompson's Case*, 8 Gratt. 637; *Trim's Case*, 18 Gratt. 983, 98 Am. Dec. 765; *Kennedy's Case*, 2 Va. Cases 510; and it also has sanction in *McCue's Case*, *supra*, where it was held that the reading of the daily newspapers in which full accounts were given of the trial, with sensational headlines, which could hardly escape the attention of the reader, even though he faithfully endeavored to avoid all parts of the newspaper which referred to the trial, was not sufficient ground to invalidate the verdict of such jury, especially when the counsel for the accused knew at the time that the jury were so reading such newspapers, and made no objection until after their verdict was rendered. See also *Thompson & Merriam on Juries*, pp. 413, 415.



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In this case it is conclusively shown by the evidence taken after the trial that counsel for the accused knew that the jury attended the moving picture show before the case had been submitted to them for their verdict, and that with knowledge of this fact they remained quiet and raised no objection to the action of the jury in this behalf, taking their chances of a favorable verdict, and raised this question only after the jury had rendered a verdict against the accused.

"A party cannot go forward with a trial and take his chances of success and, after the case has gone against him, seek a new trial upon some act of the jury known to him before the case was submitted to them, and which he afterwards claimed to be misconduct." *A. & D. Ry. Co. v. Peake*, 87 Va. 130, 12 S. E. 348; *Williams' Case*, 93 Va. 769, 25 S. E. 659; *McCue's Case*, *supra*. See also *State v. Ballew*, 83 S. C. 82, 63 S. E. 688.

We are now brought to the remaining assignment of error, which presents the question whether or not the trial court should have set aside the verdict because contrary to the law and the evidence.

The law of the case was propounded to the jury in a series of instructions, to none of which did the accused take exception, and many of the material facts and circumstances proven at the trial have been already adverted to in connection with other questions disposed of in this opinion and need not be here repeated.

At the outset we may say that the evidence very conclusively shows (1) that the accused had not only a grudge against the deceased, but bore toward him a feeling of revenge; and (2) that he held human life cheap, and was a man whose first thought was to kill the man against whom he felt a grievance. The threats he made against the accused, which we have narrated; the finding on the scene of this horrible tragedy of the fore-arm of an Ithaca gun such as was owned by him in his possession up to the date of this murder, so far as the evidence shows; the putting into his pocket of a pistol answering in

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character and calibre to the character and calibre of the pistol from which the bullets entering the body of his victim might have been fired; and the wad found in deceased's body of the size used in the gun he owned, and the stamp as to contents answering to the class of cartridges he alone kept on sale in the neighborhood, told an awful and damning story against the accused, and, along with other facts and circumstances testified to, entwined around him such a network of incriminating circumstances that he did not, and could not, extricate himself.

He attempted to prove by A. A. Holland and his wife, at whose house he had lived on the most intimate terms and relationship for years, and by a sojourner at that house for some months, an *alibi*; but with respect to this testimony we forbear to say more than that a careful reading of it leads irresistibly to the conclusion that the jury were well warranted in wholly disregarding it, as doubtless they did.

A weak and absolutely futile attempt was made to prove that the accused had parted with the Ithaca gun traced to his ownership, several days before the 26th day of October, 1908, and the one witness testifying in this connection not only could not give the name of the buyer, but told such a flimsy and improbable story that the jury could not have given the least credence to it. To the finding of the fore-arm of an Ithaca gun bearing the number 140,444, dropped by accident by the assassin at the scene of this crime, is added the proof of the incriminating circumstance that this same fore-arm of the gun had bounded or dropped off the gun when used by its owner from whom the accused acquired it; that the former owner, while out hunting with this gun but a short while before the accused became its owner, said to his companion that a piece of his gun was gone, and upon the suggestion of this companion search was made where the gun was last fired and there the missing fore-arm was found. By an unbroken chain of circumstances, an Ithaca gun bearing upon its fore-arm the number 140,444, was substantially and fairly traced from the manu-

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facturers of the gun at Ithaca, N. Y., to a firm in Petersburg, Va., from that firm, in October, 1907, to Holland & Hardy who bought it for Holland; from Holland to Samuel Hardy, the accused, and from the accused to the spot where the deceased, the object of the accused's venom and malice, received his death wounds, and from just such a gun, loaded with just such cartridges as that gun carried, and just such as the accused had a supply of.

Again, the accused sought to break the force of the circumstantial evidence unmistakably pointing to him as the person guilty of the foul murder of the deceased, by introducing testimony to show that a negro man by the name of George Wiggins had made some sort of a vague and indefinite threat against the accused or his family; but in addition to this testimony developing nothing worthy of the consideration of the jury, Wiggins testified for the Commonwealth at the trial of this case, and made the statement, which remained uncontradicted, that he and the deceased were never unfriendly; that they amicably settled the little differences between them about some ditching some time before the deceased's death, and that he (witness) was not in the county of Nansemond, but in the county of Isle of Wight, on October 26, 1908, the date of the murder of the deceased.

The accused was clearly put in a position in which it was incumbent upon him to explain the incriminating circumstances pointing to him as the party guilty of the horrible crime with which he was charged. If he had made a *bona fide* disposition of the gun in question, he could have proven it beyond all doubt, and his effort to prove that fact and an *alibi* by unsatisfactory evidence left him in a worse condition than if he had not made the effort.

It is well recognized that the conduct of one accused of a crime, after its commission becomes known, is a circumstance to be considered. On the day after the commission of this murder, when all, or nearly all, persons in and around the little

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town of Holland were going to the home of the deceased, offering sympathy to the family, and to aid in running down the perpetrator of the crime, the accused went not to the home of the deceased, nor did he manifest the least concern as to what had happened; but in the course of the day when it had become generally known that bloodhounds had been ordered and were expected soon to arrive, he mounted a lumber wagon and rode away into the forest where he remained for hours, and doubtless till all fear of being pursued by bloodhounds had vanished.

The jury have considered the vicious and repeated threats proven to have been made by the accused, going to show that he was a declared enemy of the murdered man, having a motive to take his life; that he had a double motive—one, of revenge, the other to prevent a prosecution against him for a criminal offense—in fact two, for one of which, if found guilty, he would have been severely punished. All the evidence tending to prove the motive, the proximity, and the opportunity, concentrated on the accused, and his efforts to break down this overwhelming proof adduced by the Commonwealth wholly failed. The entire evidence in the case has had careful consideration, and while there is, naturally, numerous conflicts and inconsistent statements of witnesses therein, the jury were the sole judges of the facts and circumstances which the evidence tended to prove, and the inferences or conclusions to be drawn therefrom, and they have concluded that the evidence established the guilt of the accused.

By a long line of decisions by this court, coming down to *O'Boyle's Case*, *supra*, and later, it has been settled that the jury are not only the judges of the credibility of witnesses, but of the weight to be given to their testimony, and their verdict solves all conflicts and contradictions among them; that a court has no power to grant a new trial, unless the verdict is against the law, or is contrary to the evidence, or is without evidence to support it.

Upon the whole case, we are of opinion that the verdict

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against the accused was not only fairly rendered, but is amply supported by the evidence, and, therefore, the judgment of the circuit court in accordance with the verdict of the jury is affirmed.

*Affirmed.*

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## **ADVERSE POSSESSION.**

1. *Color of Title—Condemnation Proceedings—Adverse Possession—Parties.*—The record of condemnation proceedings, though defective, may, after final judgment therein, be introduced in evidence in an action of ejectment for the purpose of showing color of title, to be followed by proof that the defendant and those under whom he claims have been in the actual and adversary possession of the premises for the period prescribed by law. It is immaterial that neither the plaintiff nor those under whom he claims were parties to the condemnation proceedings. *Knight v. Grim*, 400.
2. *Ejectment—Color of Title—Record in Condemnation Proceedings—Final Judgment Therein.*—The filing of a petition to condemn land and the entry of an order appointing commissioners to ascertain the damages are not alone sufficient to constitute color of title which, if held adversely for the statutory period, will ripen into good title. There must, in addition, be a final judgment of the court fixing the amount of the compensation, and the payment of the same to the parties entitled thereto, or into court. Then for the first time does the record furnish color of title. *Knight v. Grim*, 400.

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**APPEAL AND ERROR.**

1. *Amount in Controversy—Disallowed Set-Off.*—A set-off is equivalent to an action, and where the amount of a set-off disallowed by the trial court exceeds three hundred dollars, the amount in controversy is within the jurisdiction of this court. *Norfolk & W. R. Co. v. Potter*, 427.
2. *Appellant to Show Error.*—The burden is upon the appellant to satisfy this court that there was error to his prejudice in the decree of the trial court, and, failing in this, that decree will be affirmed. *Johnson v. Michaux*, 595.
3. *Award After Final Decree—Pleading—Reference in Brief.*—An award made under a submission subsequent to a final decree in a cause cannot be relied upon in this court when introduced for the first time in the form of a "reply brief." *Solender v. Strickler*, 273.
4. *Commissioner's Report—Conflict of Evidence.*—Where the evidence is conflicting, the findings of a commissioner in chancery on a question of fact approved by the trial court, will not be disturbed on appeal unless they are clearly wrong. *Virginia & Ky. R. Co. v. Heninger*, 301.
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6. *Correct Verdict—Ruling on Instructions.*—The ruling of the trial court on instructions will not be reviewed by this court when, upon the facts proved, there could not properly have been any other verdict than the one rendered by the jury. *Bryan v. Nash*, 329.
7. *Conflicting Instructions—Harmless Error.*—The doctrine of harmless error is seldom, if ever, applied to conflicting instructions on a material point, as the court cannot tell whether the jury were guided by the correct or the incorrect instructions. *Pulaski Coal Co. v. Gibboney Co.*, 444.

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8. *Defective Counts in Declaration—General Verdict—Reversal—Leave to Amend.*—If a declaration contains several counts based on different causes of action, some of which are bad, a general verdict for the plaintiff will be set aside by this court, as it cannot be told whether it was founded on the good counts or the bad, and the judgment of the trial court thereon will be reversed and the case remanded to the trial court with liberty to the plaintiff, if so advised, to amend the defective counts. *Ches. & O. R. Co. v. Melton*, 728.
9. *Disputed Facts—Verdicts.*—A plaintiff in error stands as a demurrant to the evidence, and where the questions of fact involved are so seriously controverted that reasonable men might honestly differ in their conclusions, the verdict of the jury must be upheld. *Danville v. Thornton*, 541.
10. *Errors Corrected by Instructions—Harmless Error.*—If any prejudice which a party could have suffered by permitting a witness to answer an improper question was corrected in the trial court by a proper instruction to the jury, it is not the subject of complaint in this court. *Norfolk & W. R. Co. v. Thomas*, 622.
11. *Evidence—Admissibility—Harmless Error—Sale of Standing Trees.*—Where, in an action to recover the price of standing trees sold by the plaintiff to the defendant, it is sufficient for the purpose of the plaintiff to show possession, the fact that the trial court permitted the plaintiff to offer in evidence a deed to himself from A, whereas, in a written agreement between the parties to the action it was stated that he claimed under B, was, at most, harmless error, where there was nothing in the bill of particulars filed by the plaintiff which required the exclusion of said deed. *Hurricane Lumber Co. v. Lane*, 380.
12. *Exclusion of Evidence—Bill of Exception.*—The exclusion of the answer of a witness to a question is not a ground of error unless the bill of exception shows what answer was expected. *Washington Park Co. v. Goodrich*, 692.
13. *Grounds of Demurrer—New Grounds.*—A defendant is bound by the grounds of demurrer assigned in the trial court, and cannot present new grounds for the first time in the appellate court. *Hot Springs L. Co. v. Revercomb*, 240.
14. *Grounds of Defense—Refusal to Require—When Harmless.* Where it is manifest that the plaintiff was not embarrassed, hindered or prejudiced in any way by the refusal of the trial court to require the defendant to state his grounds of defense to an action of ejectment, the judgment will not be reversed on that account, as the error, if any, was harmless. *Knight v. Grim*, 400.



15. *Improper Evidence—Harmless Error.*—The answer of a witness which shows that he has no knowledge on the subject of inquiry, if error, is harmless. *Ches. & O. R. Co. v. Christian*, 723.
16. *Instructions—Harmless Error.*—A case will not be reversed for rulings on instructions where it appears that the jury were fully instructed on every phase of the case, and it does not appear that the jury could have been misled, or that the losing party was in any way prejudiced by them. *Cook Mining Co. v. Thomas*, 369.
17. *Instructions—Jury Fully Instructed—Rulings on Other Instructions.*—If the jury were fully and fairly instructed on the whole case so that they could not have been misled by the instructions, it is unnecessary for this court to consider the propriety of the rulings of the trial court on other instructions tendered and refused. *Ches. & O. R. Co. v. Greaver*, 350.
18. *Issue Out of Chancery—When Ordered.*—Where a charge of fraud is involved, and the evidence is conflicting, and involves the credibility of witnesses, and the proof is not sufficiently definite and certain to satisfy this court that the ends of justice have been obtained by the decree of the trial court, it will reverse the decree and remand the cause for the trial of an issue out of chancery to determine the matter in controversy. *Ewan v. Louthan*, 575.
19. *Misleading Instructions—Harmless Error.*—This court will not reverse a judgment because the trial court gave an instruction which was not clear and was susceptible to misconstruction, if it clearly appears from the whole record that the party objecting was not prejudiced by it. *Homestead Ins. Co. v. Ison*, 18.
20. *Objection for the First Time—Filing of Set-Off—Case Heard on Set-Off—Estoppel.*—A plaintiff will not be allowed to make the objection for the first time in this court that a set-off was not filed by the defendant in the trial court, where it appears that, although the set-off was not marked filed, and the record does not show the filing, the account of set-offs was in the record before the trial began, and the plaintiff had notice of it; that the defendant called attention to it, witnesses were examined with respect to it, the instructions dealt with the subject and were based upon it, and both parties, throughout the trial, treated it as a part of the record to be considered by the jury and the court. *Norfolk & W. R. Co. v. Potter*, 427.
21. *Record—Parties—Effect of Former Decrees.*—Upon an appeal to this court, the case must be heard and determined upon the record considered and passed upon in the trial court, and hence an agreement between counsel for the respective parties that, in order to determine the rights of all parties interested in the funds in the cause, it shall be heard and determined

- in this court as if certain persons who were not parties in the trial court were parties to the record, must be ignored. Nor will an agreement between counsel, as to the effect of a former decree entered in the cause, be considered. *Brown v. Western State Hospital*, 321.
22. *Reversal—Leave to Amend Declaration—Effect of Amendment—Case at Bar.*—Where the judgment in an action at law has been reversed by this court and cause remanded, with liberty to the plaintiff to amend his declaration, and he has amended it, it will be presumed that he made, in his amended declaration, the strongest presentation of his case that the facts would permit, and, on a second writ of error calling in question the sufficiency of the declaration as amended, if it is not sufficient this court will render such judgment as the trial court ought to have rendered sustaining the demurrer to the declaration, and will enter up final judgment for the defendant. But under the facts of the case at bar, this judgment will be without prejudice to the right of the plaintiff to file a bill for the specific performance of the contract in suit, or to rescind the same and have the title to the lots mentioned in the contract, or such of them as remain unsold, conveyed to him. *Nottingham v. Ackiss*, 810.
23. *Verdict—Evidence to Support.*—The verdict of a jury will not be set aside on writ of error where the evidence tends to support their finding. *Cook Mining Co. v. Thomas*, 369.
24. *Verdict Contrary to Conceded Facts.*—Courts are not required to believe that which is contrary to human experience and the laws of nature, or which they judicially know to be incredible, and although a plaintiff in error occupies the position of a demurrant to the evidence, yet if the verdict of the jury is dependent for its support upon the testimony of a witness which is contradicted by the conceded facts in the case, it will be set aside and a new trial awarded. Testimony in conflict with conceded or undisputed facts cannot, in the nature of things, be true, and hence cannot form any basis for a conflict upon which to rest a verdict. A court is not bound to stultify itself by allowing a verdict to stand, although there may be evidence tending to support it, where the physical facts demonstrate such evidence to be untrue, and the verdict to be unjust and unsupported in law and in fact. *Norfolk & W. R. Co. v. Crowe*, 798.
25. *Verdict Sustained by Evidence.*—The evidence in the case at bar, considered as on a demurrer to the evidence, sustains the findings of the jury, and their verdict cannot be disturbed by this court. *Interstate R. Co. v. Tyce*, 38.

See **BILLS OF EXCEPTION**, 1, 2, 3, 5; **CRIMINAL LAW**, 1, 2; **DAMAGES**, 7; **EQUITY**, 7; **EVIDENCE**, 4, 12; **FRAUDS, STATUTE OF**, 2; **INSTRUCTIONS**, 6; **STATE CORPORATION COMMISSION**, 1; **WITNESSES**, 4.

#### **ARBITRATION AND AWARD.**

1. *Award Outside Submission—Severance.*—In an arbitration between a city and a street railway company as to the amount due by the latter for street paving, if the award goes beyond the submission and undertakes to exempt the railway company from all obligations under the city ordinances, or the charter, to repair the pavement on each side of its rails for a period of five years, this part of the award is bad, but is separable from the residue and should be stricken out. *McKennie v. Charlottesville R. Co.*, 70.
2. *Grounds for Setting Aside Award.*—It is equally the rule of equity as of law that the reason for setting aside an award must appear on its face, or there must be misbehavior in the arbitrators, or some palpable mistake. *McKennie v. Charlottesville R. Co.*, 70.

See **APPEAL AND ERROR**, 3; **MUNICIPAL CORPORATIONS**, 9.

**ARREST OF JUDGMENT.** See **PLEADING**, 3.

**ASSESSMENT FOR TAXES.** See **TAXATION**, 13.

#### **ASSIGNMENTS.**

1. *Equitable Assignments.*—Words which show an intention of transferring or appropriating a chose in action to or for the use of another, if based upon a valuable consideration, will, in contemplation of a court of equity, operate as an assignment. *Hawes v. Wm. R. Trigg Co.*, 165.
2. *Hypothecation.*—If a shipbuilding company deposits with a bank, as a security for loans, a contract with the United States Government for the construction of a vessel, and executes to the bank a power of attorney authorizing the bank to collect all payments made by the government under said contract, and, on the faith of such deposit and power of attorney, the bank makes loans to said company, this transaction constitutes, under the laws of this State, a valid assignment or hypothecation of said contract with the government. *Hawes & Co. v. Wm. R. Trigg Co.*, 165.
3. *Priority—Liens for Labor and Supplies.*—A valid assignment of a chose in action made by a manufacturing company is superior to liens for labor and supplies (under section 2485 of the Code) furnished more than two years thereafter. *Hawes & Co. v. Wm. R. Trigg Co.*, 165.

4. *Validity—Claims Against Federal Government—Sec. 3477 Revised Statutes.*—The object of section 3477 of the Revised Statutes of the United States, declaring void assignments of claims against the government except upon very restricted conditions, was to protect the government, and not the claimant, and to prevent frauds upon the treasury. Such transfers may be disregarded by the government, but may be made in the legitimate course of business, in good faith, to secure an honest debt. A transfer of a claim against the United States Government, though not made in accordance with section 3477 of the Revised Statutes, is valid, and will be enforced where the government has voluntarily paid the money due by it into a State court to be disposed of in accordance with the rights of the parties as ascertained by that court. *Hawes & Co. v. Wm. R. Trigg Co.*, 165.

#### ASSIGNMENTS FOR BENEFIT OF CREDITORS.

1. *Waiver—Ignorance of Rights.*—Creditors secured by a deed of trust cannot be held to have waived their security if they were ignorant of its existence at the time of the alleged waiver. *Percy v. First National Bank*, 129.

#### ASSUMPSIT.

1. *Affidavit with Plea—Sufficiency of Affidavit—Code, Sec. 3286.* An affidavit accompanying a plea of *non-assumpsit* "that the matters stated in the annexed plea are true" is a substantial compliance with the provisions of section 3286 of the Code requiring the defendant under certain circumstances to file an affidavit that the plaintiff is not entitled to recover anything from the defendant on the claim sued on, etc., and that is all that is necessary. The plea puts in issue the entire claim of the plaintiff, and the affidavit states that the plea is true. *Jackson v. Dotson*, 46.
2. *Affidavit with Plea—Waiver.*—The provision of section 3286 of the Code requiring the defendant to file an affidavit with his plea in actions of *assumpsit* where the plaintiff has sworn to the correctness of the account with his declaration was made for the benefit of the plaintiff, and may be waived by him, and will be deemed to have been waived where he not only makes no objection when the plea is tendered without a sufficient affidavit, but, though present by counsel, assents to, or accepts without objection, a continuance of the case until the next term of the court, "with leave to the defendant to file within fifteen days his grounds of defense." *Jackson v. Dotson*, 46.

#### ASSUMPTION OF RISK. See MASTER AND SERVANT, 2.

**ATTACHMENTS.**

1. *Non-residents—Soldiers in Service—Residents on Land Ceded to United States—Right of State to Serve Process.*—A person born and domiciled in another State, who comes to Fortress Monroe (which is within the territorial limits of this State, but under the exclusive jurisdiction of the United States), for the purpose of enlisting in the army, and enlists and remains an enlisted soldier of the United States, does not thereby acquire a residence in this State so as to defeat the right of a creditor to attach his property in this State on the ground that he is a non-resident. The mere fact that the State has the right to serve process, civil and criminal, in the territory ceded to the United States does not affect the personal status of one resident in such territory. The power to serve process on the defendant is not the test of the right to issue an attachment against him as a non-resident. *Bank of Phoebus v. Byrum*, 708.

See CORPORATIONS, 2.

**ATTORNEY AND CLIENT.**

1. *Defalcation of Agent—Loss of Funds—Case in Judgment.*—Pending a controversy between first and second-class creditors over a fund a check for the fund was drawn payable to the counsel of said creditors, jointly. Each of the counsel endorsed the check and delivered it to one of the counsel for creditors of the second class with the understanding that he would place it in bank to their joint credit. He failed to do this, and appropriated the money to his own use, and only a part of it has been realized by the creditors of the first class since the controversy was decided in their favor. The question is who shall bear the loss, as between the creditors, of so much of the fund as has not been realized.  
*Held:* The whole check must be credited, as of its date, upon the claims of the first-class creditors. Their counsel in endorsing and delivering the check to one of the counsel for creditors of the second class, with the agreement aforesaid, constituted him the agent of the parties endorsing the check, and the agent in collecting and misappropriating the proceeds of the check was acting for himself; and not for his clients. The second class creditors cannot be made to pay the penalty of misplaced confidence in the agent of the other counsel. *Miller v. Penniman*, 780.
2. *Equity Practice—Attorney's Claim to Funds—Accounting—When Refused.*—After the funds in a cause have passed beyond the control of the court, and the cause is practically ready for

a final decree, a court of equity will not, at the instance of the counsel for some of the parties (who has paid no attention to the case for years, and whose clients have been, in the meantime, represented by other counsel) order an account to ascertain what is due to him from his clients for services rendered in the cause. *Miller v. Penniman*, 780.

ATTORNEY IN FACT. See ASSIGNMENTS, 2.

AUTOMOBILES. See NEGLIGENCE, 1, 2.

BANK BOSS. See MASTER AND SERVANT, 1, 4.

BANKS AND BANKING.

1. *Taxation—Value of Shares—Deductions—Assessed Value of Real Estate.*—In ascertaining the value of the shares of bank stock for taxation under Acts 1908, p. 325, the value of the real estate otherwise taxed, which is to be deducted from the aggregate of the bank's capital, surplus and undivided profits, is the assessed value of such real estate, and not its actual value. Any other construction would render the act of doubtful constitutionality under the provisions of section 182 of the Constitution. *Commonwealth v. Va. Bank Co.*, 552.

See TAXATION, 2.

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BILL OF EXCEPTION.

1. *Certifying Evidence—Failure to Identify—Nunc Pro Tunc Order.*—The evidence inserted in a bill of exception by reference must, in some way, be identified or earmarked by the judge under his own hand, otherwise it is no part of the bill and cannot be considered by an appellate court. If not so identified, within the time prescribed by law for taking the bill, it cannot be so identified afterwards by a *nunc pro tunc* order. The identification of the evidence to be inserted in a bill of exception is a judicial act to be performed by the judge himself within the time prescribed for filing the bill, and cannot be delegated to the clerk. A skeleton bill containing such expressions as "here insert the evidence," without earmarking the evidence to be inserted, is not a compliance with the law. *Hot Springs L. Co. v. Revercomb*, 240.
2. *Jurisdiction to Sign—Record Evidence.*—The record itself must show the jurisdiction of the trial court, which is merely stat-

utory, to sign bills of exception and make them a part of the record, and parol evidence is insufficient to show these facts. *Standard Peanut Co. v. Wilson*, 650.

3. *Record Evidence of Signing—Parol Evidence—Insertions by Clerk.*—While the statute declares that as soon as a bill of exception is signed by the judge it “shall be a part of the record of the case,” still it must appear from the record itself when the bill of exception was signed and thereby made a part of the record. That fact cannot be made to depend upon parol evidence. Neither parol evidence, nor custom, nor long practice in a particular court will avail to add to or take from the record as made under the supervision of the trial judge. A statement by the clerk which is no part of the final order in a cause and not authorized by the trial judge, but which is inserted by him in making up the record for this court that “the bills of exception referred to in the foregoing order are in the words and figures following, to wit” is no part of the record. *Standard Peanut Co. v. Wilson*, 650.
4. *Signing—Agreement of Counsel—Motion for New Trial.*—Pending a motion for a new trial of an action at law, and while the same is undecided, the whole matter is within the breast of the court, with full power to sign such bills of exception and enter such judgment as may be proper, regardless of the agreement of the parties that bills of exception may be filed within sixty days after verdict. *Hot Springs L. Co. v. Revercomb*, 240.
5. *Time of Filing—Record Evidence—Code, Section 3385—Mandatory Provisions.*—Section 3385 of the Code, with reference to filing bills of exception, is mandatory, and unless the record shows affirmatively that bills of exception were signed in accordance with its provisions they do not constitute part of the record. The clerk has no authority to make them a part of the record, nor does the mere copying by him of unauthenticated bills have that effect. Where time has been given beyond the term for filing a bill of exception, the record must show affirmatively that it was filed within the time limited. In the case at bar, the record is silent as to which, if any, of the statutory requirements have been complied with, and the bills are not dated, and cannot be considered as parts of the record. *Standard Peanut Co. v. Wilson*, 650.
6. *When Unnecessary.*—Where the want of power in a court to enter an order appears on the face of the record no bill of exception is necessary. *Hot Springs L. Co. v. Revercomb*, 240.

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**BILLS AND NOTES.**

1. *Waiver—Implied Waiver—Case at Bar.*—A waiver of legal rights will not be implied except upon clear and unmistakable proof of an intention to waive such rights. In the case at bar the alleged waiver of notice to an endorser was made by one who was not entitled to receive the notice, and who had no authority whatever to make the waiver, even if his conduct could be construed to be such, and hence is not effective. *Security Loan Co. v. Field*, 827.

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**BOUNDARIES.**

1. *Conflicting Evidence—Verdict of Jury.*—Where the evidence is conflicting as to the true location of a disputed boundary line, and as to acts of ownership exercised over the land by the claimants and those under whom they claim, the location of the line is peculiarly a question for the jury, under proper instructions from the court, and their verdict will not be set aside unless it is plainly wrong. *Pilkerton v. Roberson*, 136.
2. *Surveys—Construing Calls.*—In construing a conveyance or in applying it to its subject matter, effect should be given, as far as possible, to all of its provisions. A call to "Hall's line, and with his lines to Indian Creek," is not answered by running the line to the point where Hall's line crosses Indian Creek. This would entirely ignore the call for running with Hall's lines. *Pilkerton v. Roberson*, 136.
3. *Surveys—Courses and Distances—Lines of Other Surveys.* Where a call is for running to the line of another survey, generally course must yield and the line be so run as to reach the line of the survey called for at such point (if no object be named in the deed) as will least change the course, and be most in accord with the next call of the conveyance. *Pilkerton v. Roberson*, 136.

See EVIDENCE, 7.



**BROKERS.**

1. *Right to Compensation—Completion of Service—Agreement Not to Charge.*—A broker's right to compensation attaches only when he has completed his services, and not till then. If he is employed to effect a lease, and afterwards, before the lease is effected or he has done all that it was his duty to do, he agrees with the owner that he will make no charge for his services, there can be no recovery by him for his services. He cannot recover for subsequent services because he agreed not to charge for them, and he cannot recover for prior services because his services were not completed, and his right to compensation depended upon a full performance of his duty as broker. *Strickland v. Fairfax*, 142.

**BYRD LIQUOR LAW.** See CONSTITUTIONAL LAW, 1; INTOXICATING LIQUORS, 1, 2, 3.

**CANCELLATION OF INSTRUMENTS.** See RESCISSION, 1.

**CARRIERS.**

1. *Claim For Lost Goods—Time For Filing—Reasonable Regulations.*—A provision in a receipt given by an express company for the carriage of goods, that the company shall not be liable for any loss or damage unless the claim therefor shall be presented in writing to it at the office of issue within thirty days from its date, is a reasonable and binding provision which must be complied with according to its tenor, otherwise the company cannot be held liable. *Va. Car. Co. v. Southern Ex. Co.*, 666.
2. *Delay in Delivering Goods—Action for Price—Measure of Damages.*—In an action against a carrier to recover the sale price of goods which the plaintiff has had reshipped to him from a distant State over the lines of connecting carriers because the consignee refused to accept them, but the delivery of which has been delayed after arrival because of the inability of the carrier to get an account of back charges and storage from the connecting carriers, where there is no proof of any such appropriation of the goods as would charge the carrier with the original sale price thereof, and there is no claim in the pleadings or proof of any other loss or damage to the goods, the only damage, if any, which the plaintiff can recover is that resulting from a failure to deliver the goods after their return, and the measure of this damage is the difference between the market value of the goods at the time they should have been delivered to the plaintiff and the time the defendant did surrender the possession, or was ready and offered to surrender it. *Norfolk & W. R. Co. v. Potter*, 427.

3. *Lost Goods—Time For Filing Claim—Waiver—Estoppel.*—Efforts to assist the owner to find a lost shipment after the carrier's exemption from liability therefor has attached under the terms of its bill of lading, do not constitute a waiver by the carrier of his right to claim such exemption, if the goods be not located. Conduct will not operate an estoppel against one who has not been induced thereby to alter his position to his prejudice. *Va. Car. Co. v. Southern Ex. Co.*, 666.
4. *Passenger—Care For His Own Safety.*—A passenger is bound to exercise ordinary care for his own safety. *Wright v. Atlantic Coast Line*, 670.
5. *Railroads—Passenger—Employee Riding on Trip Pass.*—An Employee of a railroad company riding on a trip pass, between his home and place of business, furnished by the company, is entitled to be treated as a passenger. *Bragg v. Norfolk & W. R. Co.*, 867.
6. *Railroads—Passenger Carried Beyond Station—Helpless Condition—Ejection—Care of Carrier.*—A railroad company which has carried a passenger beyond his point of destination has the right to put him off, but if it knows that he is in a helpless and irresponsible condition, although voluntarily imposed, it should not exercise its right of removal at a time or place, or under circumstances, where he will be exposed to great hazard. The company must exercise its right with due regard to the life and safety of such passenger. If a passenger who is known to be in a helpless condition, mentally and physically, is removed from a train by the conductor and placed in charge of a station agent of the company, and the latter, knowing his condition and without effort to prevent it, permits him to wander off alone in a deep snow, when the weather is severe and night rapidly approaching, and die of exposure, the company is liable. *Bragg v. Norfolk & W. R. Co.*, 867.
7. *Railroads—Helpless Passenger—Place of Ejection—Negligence.* A declaration which simply alleges that a passenger who had been carried beyond his destination, and who was mentally and physically incapable of caring for himself, was put off in the daytime, at a regular station where there was a depot, that he was not familiar with the place and that it was sparsely settled, but fails to aver that the weather was severely cold, or that the ground was covered with snow, or any fact showing that the character of the place was such as to make it dangerous, fails to show negligence on the part of the carrier, and is, therefore, bad on demurrer. *Bragg v. Norfolk & W. R. Co.*, 867.

See CONFLICT OF LAWS, 1; STREET RAILWAYS, 1, 3, 4, 5, 6.

CEDED TERRITORY. See UNITED STATES, 1.

CHILD. See WILLS, 1.

CLOUD ON TITLE. See MINES AND MINERALS, 3.

COLLATERAL ATTACK. See JUDGMENTS, 1, 5, 8; WILLS, 4.

COLOR OF TITLE.

1. *What Constitutes*.—Color of title is that which in appearance is title, but which in reality is no title at all. It is that which is apparently good title, but which, by reason of some defect not appearing on its face, does not in fact amount to title. *Knight v. Grim*, 400.

See ADVERSE POSSESSION.

COMMERCE. See INTERSTATE COMMERCE.

COMMISSIONERS. See EMINENT DOMAIN, 2.

COMMISSIONERS' REPORT. See APPEAL AND ERROR, 4, 5.

COMMON LAW.

1. *Change by Statute*.—The common law is the law of this State and remains in force except so far as it is changed by statute. *Beavers v. Putnam*, 713.

See POWERS.

COMPLETE JUSTICE. See EQUITY, 4.

CONDEMNATION PROCEEDINGS. See ADVERSE POSSESSION; EMINENT DOMAIN.

CONDITIONAL SALES. See SALES, 1, 2.

CONFLICT OF LAWS.

1. *Policy of Forum—Railroads—Preferences*.—A contract made in another State which is opposed to the well defined public policy of this State, as disclosed by its statutes, will not be enforced in the courts of this State. A contract made in another State by which a common carrier gives to one person the exclusive right to place advertisements on its box cars, gives to such person an undue and unreasonable preference and advantage over others and is contrary to the public policy of this

State, as declared by section 1294-c of Code (1904) and will not be enforced by its courts. *National Car Co. v. L. & N. R. Co.*, 413.

CONSIDERATION. See GUARANTY, 1.

## CONSTITUTIONAL LAW.

1. *Class Legislation—Byrd Liquor Law.*—Section 23½ of the “Byrd Liquor Law” is entirely consonant with the whole enactment, and is aimed at the regulation and control of the sale of intoxicating liquors, and its purpose was not to discriminate in favor of a few persons against the other members of the community. *Henry’s Case*, 879.
2. *Doubtful Validity—Practical Construction.*—If a statute is of doubtful validity it will not be declared unconstitutional where it appears that, under the same or similar constitutional provisions, like powers have been conferred by similar statutes which have never been called in question by the courts, nor by two constitutional conventions which have since assembled, but have received the sanction of the legislature and the inferior courts of the State, and have been acquiesced in for over half a century by all the departments of the State government. The practical construction thus put upon such acts will be regarded as decisive of their validity. *Scottish U. Ins. Co. v. Winchester*, 451.
3. *License Taxes—Ad Valorem System.*—There is no substantial difference between the Constitutions of 1869 and 1902 in relation to the imposition of taxes on licenses on business which cannot be reached by the *ad valorem* system. *Scottish U. Ins. Co. v. Winchester*, 451.
4. *Police Power—Authorizing Establishment of Building Lines.* An act of Assembly authorizing the councils of cities and towns to establish building lines on streets to which all property owners must conform is within the police power of the legislature, and is constitutional, if not unreasonable. Such legislation is in the interest of the health, safety, comfort and convenience of the public. *Eubank v. Richmond*, 749.
5. *Statutes—Curative Acts—Validity.*—The legislature has power to enact a law validating an agreement which was unenforceable when made. The test of the validity of curative acts which operate retrospectively is the authority of the legislature originally to have conferred the power or authorized the act. *Hurley v. Hurley*, 31.
6. *Statutes—Powers of Legislature.*—The power of the legislature of the State is supreme except so far as it is restrained by the State or Federal Constitution, and even in case of doubt as to the power, all doubts are to be resolved in favor of the

existence of the power. The courts have no power to declare an act unconstitutional unless it is so clearly and plainly so that there can be no doubt on the subject. *Henry's Case*, 879.

7. *Taxation—License Tax—Percentage of Receipts—Insurance Companies.*—An act of Assembly which levies upon an insurance company a license tax for a definite sum and also a percentage on its gross receipts, is not forbidden by that clause of the State Constitution which authorizes the General Assembly to levy a license tax on any business which cannot be reached by the *ad valorem* system. The percentage tax is not a property tax, but a privilege tax. Such has been the uniform legislative construction of such taxation for more than half a century, and such has been the course of decision in this court imposing similar taxation in analogous cases. *Scottish U. Ins. Co. v. Winchester*, 451.

8. *Taxation—Notice—"Due Process."*—If, after an assessment of taxes has been made by a city, the taxpayers are notified of a time and place when they may be heard in opposition thereto by a committee of the city council, with a right of appeal to the council by all who feel themselves aggrieved by the action of the committee, this constitutes "due process of law," and a sufficient opportunity to be heard. *Bradley v. Richmond*, 521.

9. *Law—Titles of Acts—Sufficiency.*—The settled rule with reference to sufficiency of title to statutes generally is that the constitutional provision shall be liberally construed so as to uphold the statute if practicable. All that is required is that the subjects embraced in the statute but not specified in its title shall be congruous and have natural connection with, or be germane to, the subject expressed in the title. *Hurley v. Hurley*, 31.

See EMINENT DOMAIN, 4; INTOXICATING LIQUORS, 1, 2, 3; LICENSES, 1, 2; MUNICIPAL CORPORATIONS, 3; TAXATION, 11, 13; WITNESSES, 11.

#### CONTINUANCE.

1. *Continuance—Case at Bar.*—A motion for a continuance is addressed to the sound discretion of the trial court, under all the circumstances of the case, and, while its action is subject to review by the appellate court, it will not be reversed unless plainly erroneous. In the case at bar the facts disclosed by the plaintiff's bill of particulars just filed was the ground of the motion. But the bill was not called for till the term succeeding that at which the issue was made up, and this court cannot say, under all the facts and circumstances, that the action of the trial court in refusing a continuance was plainly wrong. *Norfolk & W. R. Co. v. Spears*, 110.

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CONTRACTS.

1. *Ambiguous Language—Practical Construction.*—Where the language of a contract is ambiguous, the practical construction placed upon it by the parties is entitled to great consideration, especially when the data for any other construction is not at hand and cannot be procured. *Virginia & Ky. R. Co. v. Heninger*, 301.
2. *Construction of Writings.*—The construction of all written instruments adduced in evidence belongs exclusively to the court. *Norfolk & W. R. Co. v. Mundy*, 422.
3. *Construction—Opinion of Party—Rights of Third Persons.*—The mere opinion of the late vice-president of an insolvent manufacturing company as to whether a vessel being built by his company, or any part thereof, under the contract for its construction, became the property of the party for whom it was being built, and at what time, or at what stage of its construction, is no part of the contract, and can have no weight in its construction. *Hawes & Co. v. Wm. R. Trigg Co.*, 165.
4. *Construction of Parties—Statutory Rights of Creditors.*—The construction placed by the parties upon a contract for the construction of a vessel by a manufacturing company cannot affect the statutory rights of the creditors of the company, as the statute necessarily enters into and forms a part of the contract. *Hawes & Co. v. Wm. R. Trigg Co.*, 165.
5. *Existing Laws Part of Contracts.*—The laws which subsist at the time and place of making a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This principle embraces alike those which affect its validity, construction, discharge and enforcement. *Hawes & Co. v. Wm. R. Trigg Co.*, 165.
6. *Maturity—Right to Sue—Promise to Pay After Another Debt is Paid—Fraud.*—A promise to pay a debt when a certain other specified debt is paid is a promise to pay when the specified debt ought to have been paid, or at its maturity. The debtor has no right to postpone the fulfillment of his obligation by refusing and neglecting to pay the specified debt. Such a refusal, while possessing ample ability to pay, is a fraud on the rights of his creditors. *Solenberger v. Strickler*, 273.
7. *Performance—Acceptance of Work.*—Although work is not completed in all respects according to contract, objection cannot be made on that account if the work was accepted as in fulfillment of the contract. *Virginia & Ky. R. Co. v. Heninger*, 301.
8. *Release—Noration—Intent—Question for Jury—Instructions.*—Whether or not the taking by the plaintiff of the notes of a third party for a debt due the plaintiff by the defendant was a release of the defendant from liability was a question of intent to be determined by the jury from all the evidence in the

case, but if there was no evidence sufficient to show such intent, an instruction which told the jury they must find for the plaintiff unless they believed that he had accepted the third person as his debtor, and had agreed to release the defendant from liability for the debt, was not prejudicial to the defendant. *Fentress v. Steele*, 578.

9. *Renewal—Question for Jury—Ratification of Agent's Acts.*—If a contract of employment between A and a firm has been revoked by the withdrawal of one of the members of the firm, and the remaining members of the firm continue to conduct the business as a new firm, and A, through his agent, repeatedly urges the new firm to carry out the contract, and they undertake to do so, in an action by the new firm against A to recover the consideration of the contract, the question should be submitted to the jury whether or not there had been a renewal or continuation of the original contract. *Arents v. Commonwealth*, 509.
10. *Time of Performance—Extension.*—Changes made as to work to be done after a contract is entered into, which require more work, entitle the contractor to more time in which to do it. *Virginia & Ky. R. Co. v. Heninger*, 301.

See EVIDENCE, 14; GUARANTY, 1; MUNICIPAL CORPORATIONS, 9; PRINCIPAL AND AGENT, 4; SHIPPING, 1; UNITED STATES, 2, 3.

CONVERSION. See CARRIERS, 3.

CORPORATION COMMISSION. See STATE CORPORATION COMMISSION.

#### CORPORATIONS.

1. *Charter Powers—Express and Implied.*—What is fairly implied in the charter of a corporation is as much granted as what is expressed, but the charter still remains the measure of the powers of a corporation, and the enumeration of these powers implies the exclusion of all others. *National Car Co. v. L. & N. R. Co.*, 413.
2. *Foreign Corporations—What Constitutes—Resident Agent—Attachments.*—A corporation chartered and organized under the laws of another State, and holding no charter from this State, is a foreign corporation, although it has an agent, appointed under the requirements of the statute of this State, upon whom process may be served; and the fact that it is such foreign corporation is all that is required by section 2959 of the Code to justify the issuing of an attachment against its property. *Cook Mining Co. v. Thompson*, 369.

**COUNTIES.**

1. *Commissions on County Levies*.—In computing the treasurer's commissions for collecting and disbursing the county levy, the district school levy, and the road levy—the law on the subject being in doubt and uncertainty—the several sums comprising these levies should be segregated and a commission allowed upon each of the several items for the years prior to the year 1904, in accordance with the construction generally acted on by treasurers and acquiesced in by the public; but for the year 1904 and subsequent years, they should be aggregated, as it is expressly provided by statute (section 1515, Code 1904) that "in computing the commissions for collecting and disbursing all sums levied for county, school, and district purposes, the amount shall be treated as one sum, and shall not be divided for the purpose of calculating the treasurer's commissions." *Hughes v. Peebles*, 374.
2. *County Roads—Board of Supervisors—Right to Sue*.—The boards of supervisors of the several counties have the control, supervision, management and jurisdiction over all of the county roads, and are, in this respect, the successors of the former county courts. The board of supervisors of a county may maintain a suit to compel a railroad company to construct a county road which it had contracted with the county court to construct in lieu of a public road taken and occupied by it. *Norfolk & W. R. Co. v. Supervisors*, 95.

See LIMITATION OF ACTIONS, 1.

COUNTY ROADS. See LIMITATION OF ACTIONS, 1; RAILROADS, 6, 7, 8, 28, 29.

COURT RIGHT. See EJECTMENT, 1.

COURTS. See CONTRACTS, 2; JUDGMENTS, 1.

COVENANT OF SEISIN. See DAMAGES, 1.

COVENANTS. See ESTOPPEL, 1.

**CRIMINAL LAW.**

1. *Appeal and Error—Verdict Contrary to Evidence*.—A verdict of conviction in a criminal case cannot be set aside on a writ of error where there is sufficient evidence to support it. The plaintiff in error stands as on a demurrer to the evidence. *Dix's Case*, 907.
2. *Circumstantial Evidence—Latitude in Presentation*.—Where the evidence to identify an assassin is purely circumstantial,



greater latitude is allowed in its presentation than if it were direct and positive. The jury should have before them every fact which will enable them to come to a satisfactory conclusion. *Hardy's Case*, 910.

3. *Conflicting Evidence—Verdict.*—Although the evidence in a criminal case presents conflicts and inconsistent statements of witnesses, the jury are the sole judges of the facts which the evidence tends to prove, and of the inferences and conclusions to be drawn therefrom, and their verdict will not be set aside unless it is against the law, or is contrary to the evidence, or is without evidence to support it. *Hardy's Case*, 910.
4. *Evidence—Alibi—Use of Unsatisfactory Evidence—Effect.* Where circumstantial evidence tends strongly to prove that the prisoner is guilty of the murder of which he is accused, his effort to prove, by unsatisfactory evidence, an *alibi*, or that he was not the owner of the gun with which the murder was committed, at the time of its commission, leaves him in a worse condition than if he had not made the effort. *Hardy's Case*, 910.
5. *Evidence—Conditional Threats.*—On a charge of murder, conditional threats made by the accused are admissible in evidence whenever it is shown that the deceased had put himself within the condition laid down by the accused. It is not necessary that the person killed should have been named, when the facts and circumstances make it clear that he was the party intended. *Hardy's Case*, 910.
6. *Evidence—Conduct of Accused.*—The conduct of one accused of crime, after its commission becomes known, is a circumstance to be considered on his trial for the crime. *Hardy's Case*, 910.
7. *Evidence—Express Threats—Impersonal and Conditional Threats.*—Where definite, express, personal and malignant threats have been proved to have been made by one indicted for murder, with direct reference to the deceased, evidence of other impersonal and conditional threats, and of the ill-feeling existing between the deceased and the accused should be allowed to go to the jury, to be considered by them, along with other threats proved in the case, and given such weight in connection therewith as the jury think it deserves. *Hardy's Case*, 910.
8. *Evidence—Indefinite Threats.*—Upon proof of indefinite threats, as that the accused "was going to kill him," without naming anyone, it is for the jury to determine from all the facts and circumstances to whom the threat referred. *Hardy's Case*, 910.
9. *Evidence—State of Feeling Between Parties—Circumstantial Evidence of Guilt of Accused.*—Evidence as to the state of feeling existing between the accused and the victim of a murder

is not restricted to cases where it has been shown that the accused committed the crime. It may also be received where the evidence tends to prove that the accused was the perpetrator of the crime. *Hardy's Case*, 910.

10. *Indictment—Election—Time for Making.*—It was not error in the case at bar to refuse to compel the prosecuting attorney to elect for which offense charged he would elect to prosecute before any evidence was introduced on behalf of the Commonwealth. This is a matter in the discretion of the trial judge, and, in the present case, it was properly exercised by postponing the election till after all the evidence for the Commonwealth had been introduced, but before the accused opened his defense. *Dix's Case*, 907.
11. *Misconduct of Jury—Attending Picture Show.*—A verdict of guilty in a murder trial will not be set aside simply because the jury in charge of officers of the court were permitted to attend a moving picture show of a somewhat tragic character, but bearing no similarity to the case on trial, and where the jury could not possibly have been affected or influenced by seeing it. It is indiscreet, however, for officers of the court in charge of the jury to attend such performances, even though they occupy a separate gallery and have no communication whatever with outsiders, and such conduct is highly censurable. *Hardy's Case*, 910.
12. *Murder—Evidence to Show State of Feeling Between Deceased and Accused.*—On an indictment for murder, evidence of a detective that the deceased, shortly before his death, employed him to hunt up evidence that accused was selling liquor illegally, with a view to prosecuting the accused therefor, but that he found none, is admissible for the purpose of showing the state of feeling existing between the deceased and accused. *Hardy's Case*, 910.
13. *Murder—Evidence—Feelings of Parties Toward Each other—Purpose of Deceased—Partial Communication to Accused.*—On a charge of murder, it is proper to introduce in evidence facts which tend to show the state of feeling existing between the deceased and the accused, and that it was the settled purpose of the deceased to have the accused prosecuted and punished for a violation of the criminal laws of the State, although all that was said to the witness was not communicated to the accused. *Hardy's Case*, 910.
14. *New Trial—After-Discovered Evidence.*—A verdict will not be set aside for after-discovered evidence where it appears that the evidence was known to the accused during the progress of the trial, and that he did not ask for either delay or process to secure the attendance of the witness whose presence was desired. *Dix's Case*, 907.

15. *New Trial—Facts Known to Counsel During Trial—Failure to Object.*—A prisoner cannot go forward with the trial of his case and take his chances of success, and, after he has been found guilty, seek a new trial on the ground that the jury attended a moving picture show, when his counsel knew that they had attended the show before the case was submitted to them, and yet, with that knowledge, raised no objection to their alleged misconduct. *Hardy's Case*, 910.
16. *Sale of Intoxicating Liquors—Indictment—Sufficiency.*—An indictment sufficiently notifies the accused of the charge brought against him when it charges that the defendant "within six months last past, in White Stone Magisterial District, in the county of Lancaster, did unlawfully sell and deliver intoxicating liquors and mixtures thereof, against the peace and dignity of the Commonwealth of Virginia." *Dix's Case*, 907.
17. *Trial for Murder—Evidence—Ill Feeling of Deceased—Communication to Accused.*—On a trial for murder, it is entirely proper and material to show that the purpose of the deceased to prosecute the accused for a violation of the criminal laws of the State was communicated to the accused before the murder of the deceased. *Hardy's Case*, 910.
18. *Venire Facias—Code, Section 4018—Number of Jurors to be Summoned.*—The provision of section 4018 of the Code requiring that the number of persons drawn from the box in a felony case should not be more than four in excess of the number to be summoned, was clearly not intended as a protection to the party to be tried, but to give the sheriff a certain discretion to be used if he did not summon all the jurors drawn, provided the number not summoned did not exceed four. *Hardy's Case*, 910.
19. *Venire Facias—Summoning Entire List.*—Where the order for a writ of *venire facias* in a felony case conforms to the requirements of section 4018 of the Code, both as to the number of names to be drawn and the number of persons to be summoned, the writ will not be quashed merely because it directs the sheriff to summon the entire list drawn, instead of four less than that number, in the absence of any evidence that the accused was, or could have been, prejudiced thereby. *Hardy's Case*, 910.

See EVIDENCE, 2; INTOXICATING LIQUORS, 1, 2, 3; WITNESSES, 2, 3, 11, 13.

CROSS-BILL. See EQUITY, 5.

CROSSINGS. See EMINENT DOMAIN, 4, 5; RAILROADS, 19, 23; STREET RAILWAYS, 2, 3, 4, 5, 6.

CURATIVE ACTS. See CONSTITUTIONAL LAW, 5.

CUSTOM. See BILLS OF EXCEPTION, 3; MASTER AND SERVANT, 13, 15, 19, 20, 22; WITNESSES, 10.

#### DAMAGES.

1. *Covenant of Seisin*.—The measure of damages for the breach of a covenant of seisin, where nothing passes by the deed, is the consideration paid, with interest. *Norfolk & W. R. Co. v. Mundy*, 422.
2. *Excessive*.—A verdict for \$1,500 for a personal injury resulting in a broken rib, a sprained back and other injuries cannot be set aside as excessive. *Norfolk & W. R. Co. v. Spears*, 110.
3. *Excessive—Personal Injury*.—A verdict of \$1,200 for a personal injury cannot be set aside as excessive where it appears that the plaintiff's foot and ankle were injured, and he was rendered wholly unable to attend to business for six weeks, had suffered continuous pain up to time of trial—a period of twenty weeks—and would probably continue to suffer. *Washington Park Co. v. Goodrich*, 692.
4. *Excessive Verdict—Personal Injury*.—A verdict for \$1,400 in a personal injury case will not be set aside as excessive where it appears that the plaintiff was thrown violently to the ground, his nose was broken, his hands and face scratched and scarred, and that he was detained in a hospital two weeks, or more. The amount of damages is not so great as to evince prejudice, partiality or corruption on the part of the jury, or that they were misled by some mistaken view of the case. Unless this be true, the verdict in such a case cannot be set aside as excessive. *Southern R. Co. v. Cash*, 282.
5. *Excessive Verdict—Case at Bar*.—The evidence in the case at bar is not such as would warrant the court in setting aside the verdict as excessive. *Virginian R. Co. v. Jeffries*, 471.
6. *General and Special—How Pleaded*.—General damages are such as are the natural and proximate result of the act or default complained. They are legally imported, and need not be specially pleaded. Damages which are of an unusual and extraordinary nature and are not the common consequences of the wrong complained of are said to be special damages, and must be specially laid in the declaration. *Norfolk & W. R. Co. v. Spears*, 110.
7. *Special Damages—Failure to Allege—Evidence—Harmless Error*.—Where the declaration in an action for a personal injury alleged that the injury hindered and prevented, and would in the future hinder and prevent, the plaintiff (who was the proprietor of a grocery store) from transacting his necessary business affairs, but did not otherwise claim any special dam-

ages, the fact that the plaintiff was asked a series of questions about the effect on his business which he could not specifically answer, could not have operated to the prejudice of the defendant, and the verdict of the jury will not, on that account, be set aside. *Washington Park Co. v. Goodrich*, 692.

8. *Stipulation for Liquidated Damages—Estimated Rental Value.*

A contract to pay ten dollars a day as liquidated damages for failure to complete, by a given time, a dwelling intended as a home for the owner, is not unconscionable or unreasonable, and will be upheld where the price of the house and lot amounted to seven thousand dollars, and there were special reasons why the owner desired to get into the dwelling at the time stipulated. The estimated rental value of the house and lot, under such circumstances, affords no just criterion for the measure of damages. *Crawford v. Heatwole*, 358.

9. *Stipulation for Liquidated Damages—Validity.*—Parties to a contract may stipulate in advance for the payment of a sum certain as liquidated damages, in case of breach, where the damages are in their nature uncertain and unascertainable with exactness at the time the contract is made, and may be dependent upon extrinsic conditions and circumstances, and where the amount fixed is not on the face of the contract out of all proportion to the probable loss. *Crawford v. Heatwole*, 358.

10. *Value of Building Burned.*—The measure of damages for a house destroyed by a negligent fire is the value of the house at the time of its destruction. *Norfolk & W. R. Co. v. Thomas*, 622.

See CARRIERS, 1, 2, 3; DEATH BY WRONGFUL ACT, 3; EMINENT DOMAIN, 1, 2, 3; NEGLIGENCE, 5; NUISANCE, 1, 2, 6; SALES, 4; TRESPASS, 1, 2; VENDOR AND PURCHASER, 3; VERDICTS, 1.

DAYS. See INSURANCE, 2, 13; TIME.

#### DEATH BY WRONGFUL ACT.

1. *Avoiding Injury—Conduct of Prudent Persons—Instructions.*

Where an instruction tells the jury they must find for the defendant, if they believe the plaintiff's intestate would have avoided injury if he had adopted a designated course of conduct, it is not error for the trial court to add "and that a reasonably prudent person under the facts and circumstances of this case, would and should have done so." *Ches. & O. R. Co. v. Ghee*, 527.

2. *Death of Wrongdoer Before Victim*—Code, Sections 2902, 2903, 2906.—If a party inflicts a moral wound on another and then dies before his victim, no action lies in favor of the represen-

tative of the victim against the representative of the wrongdoer, either at common law or in Virginia. Immediately upon the infliction of the wound there came into being a right of action at common law against the wrongdoer, but this perished with the death of the victim, and did not survive to his personal representative. The new right of action given by the statute to the personal representative of the victim did not come into being until his death, but, when that occurred, the right of action had been lost because of the death of the wrongdoer, which occurred before the right of action accrued which was called into being by the statute. Sections 2902 and 2903 of the Code did not give any right of action for a personal tort against the personal representative of one who was dead at the time the right accrued, but only against a living wrongdoer, and it is only the right of action under these sections which section 2906 declares shall not determine by the death of the defendant. *Beavers v. Putnam*, 713.

3. *Elements of Damage*.—In an action by a widow to recover for the wrongful death of her husband the jury may, in addition to the pecuniary loss sustained by her, add compensation for the loss of his care, attention and society, and also such further sum as they may deem fair and just by way of solace and comfort to her for the sorrow, suffering and mental anguish occasioned to her by his death. *Ches. & O. R. Co. v. Ghee*, 527.
4. *Evidence—Pecuniary Condition of Plaintiff*.—In an action for death by wrongful act or neglect, evidence of the pecuniary condition of the deceased at the time of his death is inadmissible. Such evidence is calculated to excite the sympathy of the jury, and, if received, is presumed to have wrongfully affected the verdict. *Ches. & O. R. Co. v. Ghee*, 527.
5. *Survival of Actions—Personal Injuries—Common Law Rule—Death by Wrongful Act—Virginia Statute*.—At common law personal actions died with the person and could not be revived either by or against the personal representative, and this rule has not been altered in this State in respect of an injury done to the person. Such an action still dies with the person, and no right of action for such an injury survives to his personal representative. The right of action given by the Virginia statute for death by wrongful act is not a survival action, but an independent right of action created, and not merely continued, by the statute. *Beavers v. Putnam*, 713.

## DEBT.

1. *When Action of Lies*.—An action of debt will only lie for the recovery of a certain sum of money, due by a certain and express agreement. *Nottingham v. Ackiss*, 810.

**DECLARATION.** See NEGLIGENCE, 7; PLEADING, 4, 5, 6, 7, 8, 9, 10, 11, 12, 19; RAILROADS, 14.

**DEEDS.**

1. *Construction—Conflicting Causes—Habendum—Case in Judgment—Omission of Name in Deed.*—Deed should be read as a whole, and effect given, as far as possible, to the evident intention of the parties. If it appears from the whole instrument that there is a variance between the granting and the *habendum* clauses, the latter will prevail. In the case in judgment the name of one of the grantees was omitted from the *habendum* clause, but it is manifest that the omission was an oversight, and the instrument should be construed as if the name had been inserted in the *habendum* as well as the granting clause. *Pack v. Whiteacre*, 122.

2. *Error in Recording—What Passes to Grantee and His Alience.* A purchaser of the *merchantable* timber on a tract of land cannot successfully defend an action for the purchase price thereof by showing a prior recorded deed from his vendor to another party conveying to him "the surface and merchantable timber" on the tract, when the vendor produces the original deed showing that the conveyance was in fact of the surface and *unmerchantable* timber, and that by mistake in transcribing the deed on the deed book the word "merchantable" had been substituted for "unmerchantable." The deed as executed and delivered shows what was actually conveyed, regardless of the error in recording, and the grantee therein did not take, and hence could not convey to another the merchantable timber on said tract. *Hurricane Lumber Co. v. Lowe*, 380.

See BOUNDARIES, 2, 3; LOGS AND LOGGING, 1; TAXATION, 14; VENDOR AND PURCHASER, 5, 6.

**DEFEASIBLE FEE.** See WILLS, 1.

**DEFECTIVE TITLE.** See INJUNCTIONS, 1.

**DEFICIENCY IN QUANTITY OF LAND.** See JUDICIAL SALES, 1; VENDOR AND PURCHASER.

**DELEGATION OF POWERS.** See MUNICIPAL CORPORATIONS, 3.

**DELINQUENT TAXES.** See TAXATION, 5.

**DEMURRER.** See APPEAL AND ERROR, 13; PLEADING, 10, 11, 20, 21.

**DEMURRER TO EVIDENCE.**

1. *Court to Decide as Jury Might Have Found.*—Upon a demurrer to the evidence, where the evidence is such that the jury

might have found for the demurree, it is the duty of the court to enter judgment in his favor. *Ches. & O. R. Co. v. Corbin*, 700.

2. *Positive Evidence of Demurree*.—Upon a demurrer to the evidence, the positive evidence of the demurree that he did not have knowledge of a danger confronting him must be accepted as true. *Virginia Iron Co. v. Munsey*, 156.

3. *Verbal Joinder—Amendment*.—The refusal to permit a demurrant to the evidence to amend his grounds of demurrer after a verbal joinder in the demurrer has been announced by the demurree is not prejudicial to the demurrant where, under the grounds already assigned, he has the right to rely upon, and does in fact argue the same point proposed to be made and relied on by the amendment. *Virginia Iron Co. v. Munsey*, 156.

4. *When it Should be Overruled*.—If, upon a demurrer to the evidence, the evidence is such that the jury might have found a verdict for the demurree, the court must so find and grant judgment in his favor. Furthermore, if reasonably fair-minded men might differ upon a question, such question must be decided against the demurrant on a demurrer to the evidence. *Virginia Iron Co. v. Munsey*, 156.

DESCENDANTS. See WILLS, 1.

DISCOVERED PERIL. See NEGLIGENCE, 10.

DISMISSAL. See JUDGMENTS, 4; PLEADING, 14, 15.

DOMICILE.

1. *Domicile—Residence—Change of Domicile—How effected—Case at Bar—Taxation*.—"Domicile" is of more extensive significance than "residence," and includes besides mere physical presence at a particular place, positive or presumptive proof of an intention to make it a permanent abiding place. To acquire a domicile in a particular place there must be a residence there and an intention to make that place one's home. If a person domiciled at one place but resident at another determines to make his place of residence his domicile, and continues to abide there with the intention to make it his home permanently, or for an indefinite period, he thereby acquires a new domicile. In the case at bar, the taxpayer's intention to change his domicile from this State to the city of Washington, D. C., was not only explicitly declared, but was followed by conduct consistent therewith and evincing his good faith, and he is therefore no longer taxable in this State. *Pendleton v. Commonwealth*, 229.



DOWER. See HUSBAND AND WIFE, 1.

DUE PROCESS. See EMINENT DOMAIN, 4.

DYING WITHOUT ISSUE. See WILLS, 2.

**EJECTMENT.**

1. "*Court Right*"—*Subsequent Locators*.—The use of a court order made in pursuance of section 2339 of the Code, or a "court right," as it is sometimes called, is only intended to affect those who have become locators since the date of the order, and not those who have previously acquired rights. A plaintiff in ejectment may properly be denied the right to introduce such an order unless he will avow that he will show that the defendant, or those under whom he claims, were subsequent locators. *Hurley v. Charles*, 27.
2. *Plaintiff's Title—Common Source—How Defendant Connected*. A plaintiff in ejectment need not show title beyond the common source with the defendant. He may show that common source by proper proof, but he cannot connect the defendant with the common source of title by proof of a parol purchase of the land. Such evidence would not be admissible on the part of the defendant to sustain his case, and the plaintiff will not be allowed to make out his case by its introduction. *Hurley v. Charles*, 27.

See ADVERSE POSSESSION; APPEAL AND ERROR, 14.

ELECTION. See CRIMINAL LAW, 10.

**ELECTRICITY.**

1. *Contributory Negligence—Case at Bar—Electricity*.—The Evidence in the case at bar shows that the plaintiff's intestate came to his death solely as the result of his own imprudence and lack of caution. He had been repeatedly warned of the dangers of the work in which he was engaged, and only a short time before his death he was warned of his close proximity to a heavily charged electric wire, and that if he straightened up he would come into contact with it and be killed, and yet in about a minute he raised up, came in contact with the wire and was instantly killed. Under such circumstances there can be no recovery against the company owning the wire. The law does not weigh or apportion the concurring negligence of a plaintiff and defendant, and even if a defendant has been negligent there can be no recovery by a plaintiff who has also been guilty of negligence proximately contributing to his injury. *Templeton v. Lynchburg Trac. Co.*, 853.

2. *Contact With Wires—Contributory Negligence.*—One who, in the course of his employment, is brought into close proximity with electrical wires, is not guilty of contributory negligence by coming in contact therewith, unless done unnecessarily, or without proper precautions for his safety. And when the wires, if properly insulated, would not be a source of danger, such person is only bound to look for patent defects, and not for latent defects. A person who touches an electric wire, from which the insulation is worn off, if he does it in ignorance of the nature and condition of the wire, is not negligent. *Danville v. Thornton*, 541.
3. *Uninsulated Wires—Injury to Third Persons.*—It is the duty of a company maintaining wires carrying a high voltage of electricity to keep them perfectly insulated at places where others have the right to go for work, business or pleasure, and to exercise the utmost care to keep them safe at such places; and the fact that it is expensive or inconvenient to so insulate them is immaterial. The relation of master and servant need not exist between the company and the party. *Danville v. Thornton*, 541.

**EMERGENCY.** See MASTER AND SERVANT, 6; NEGLIGENCE, 1; RAILROADS, 13.

**EMINENT DOMAIN.**

1. *Admissions Not Laid Before Commissioners—Exceptions to Report.*—An extract from the brief of counsel of a party, in the nature of an admission of the damages for which his client is liable, and which was filed in another controversy between the client and the present defendant, cannot be filed for the first time on the hearing of exceptions to the report of the commissioners in a condemnation proceeding. If the extract was of any probative value it should have been brought to the attention of the commissioners while they were engaged in ascertaining the damages to be awarded. *Norfolk & W. R. Co. v. Virginian R. Co.*, 631.
2. *Commissioners—Power of Majority—Disagreement—Statutory Rule of Construction.*—Where five commissioners appointed in condemnation proceedings, any three or more of whom may act, are all duly sworn and act, a report concurred in by four of them is all that is necessary to enable the court to take action and proceed with the case. The disagreement of the commissioners referred to in paragraph 10 of section 1105-f of the Code, when read in connection with paragraph 6 of that section has reference to a failure to agree on the part of that number of commissioners who are authorized to make a report. If there were any doubt about this construction, it is

set at rest by paragraph 3 of section 5 of the Code, declaring that "words purporting to give authority to three or more public officers or other persons, shall be construed as giving such authority to a majority of such officers or other persons, unless it shall be otherwise expressly declared in the law giving the authority." *Norfolk & W. R. Co. v. Virginian R. Co.*, 631.

3. *Inadequate Damages—Case at Bar.*—The sum awarded as damages by the commissioners in this cause is not so inadequate as to justify this court in reversing the judgment of the trial court for that cause only. *Norfolk & W. R. Co. v. Virginian R. Co.*, 631.

4. *Railroads—Crossing, Each Other—Compensation—Due Process—Equal Protection—Impairment of Contract.*—An order in a condemnation proceeding, where one railroad company is seeking to cross the track of another, which directs the commissioners appointed to ascertain the proper compensation for damages, including the easement of crossing, which should be paid by the crossing company, is sufficiently broad to embrace all subjects of compensation arising out of the crossing of the right of way which is crossed; and the tribunal provided by the statutes of this State in such case, and the proceedings before it authorized by law, constitute due process of law, and the taking of property by such method cannot be said to deny the equal protection of the laws, nor to constitute the impairment of the obligation of any contract between the State and the company whose right of way is crossed as evidence by its charter and the charters of its predecessors in title. *Norfolk & W. R. Co. v. Virginian R. Co.*, 631.

5. *Railroads—Crossing Each Other—Regulation—Code, Sec. 1294-b, Clause 3.*—The right of one railroad company to cross the track of another is specifically given, and the terms and conditions under which the right to cross is to be made effectual are prescribed by paragraph 3 of section 1294-b of the Code. This paragraph is clear and unambiguous in its terms, and deals fully and completely with the subject. It was enacted several months after paragraph 52 of section 1105-e of the Code, which relates to the condemnation of the fee, and while the two paragraphs must be construed so as to harmonize, if possible, yet if there be any repugnancy between them, the general must yield to the specific, and the earlier to the later expression of the legislative will. *Norfolk & W. R. Co. v. Virginian R. Co.*, 631.

See ADVERSE POSSESSION.

EQUAL PROTECTION. See EMINENT DOMAIN, 4.

**EQUITY.**

1. *Bill of Review—Errors Reviewable.*—The errors on the record for which a bill of review will lie must be errors of law apparent upon the face of the record. They must be such as appear on the face of the decrees, orders and proceedings in the cause, arising on facts either admitted by the pleadings or stated as facts in the decrees. The evidence outside of the decree cannot be examined to determine whether the court erred in its judgment in the determination of the facts. This is the proper office of the court upon an appeal, but not upon a bill of review. *Valz v. Coiner*, 467.
2. *Complete Justice.*—A court of equity, having properly taken jurisdiction to prevent the mining and removal of iron ore beneath the surface, may go on and do complete justice between the parties, although in doing so it has to settle the title to the ore which is in dispute. *Morison v. American Association*, 91.
3. *Equity Jurisdiction—Trusts—Effect of Subsequent Statutes.* Trusts are peculiarly within the original cognizance of courts of chancery, and subsequent enactments dealing with that subject are not to be construed as taking away their pre-existing jurisdiction, unless such intention plainly appears. *Shirkey v. Kirby*, 455.
4. *Equity Pleading—Multifariousness—Deficiency in Land—Defective Title—Complete Relief.*—A bill is not multifarious which seeks redress for deficiency in land, and defect of title to part of the tract, where both demands arose out of the same contract and are so correlated that separate suits would be inconvenient and not afford complete redress. Moreover, jurisdiction to grant redress for the deficiency in quantity is clear, and equity, having acquired jurisdiction for this purpose, will retain the cause and do complete justice between the parties. *Pack v. Whiteacre*, 122.
5. *Equity Pleading—Dismissal of Bill—Effect on Cross-Bill.*—Dismissal of an original bill does not necessarily carry with it the cross-bill. If the cross-bill is defensive merely, dismissal of the original bill dismisses the cross-bill, but where the plaintiff in the cross-bill has equities arising out of the subject matter of the original bill which entitle him to affirmative relief of which he would be deprived by the dismissal of his bill, a court of equity will treat the cross-bill as in the nature of an original bill and retain it, and grant the relief to which the plaintiff may be entitled. To do otherwise would manifestly sacrifice substance to form. *Equitable Life Soc. v. Wilson*, 571.
6. *General Original Jurisdiction—Administration of Trusts—Security for Loans.*—On the application of a trustee, a court of

equity has the power, independently of statute, to secure a loan for necessary repairs and payment of a collateral inheritance tax on the corpus of real estate held in trust as a home for the joint use and benefit, support and maintenance out of the proceeds, of a husband and wife and his infant children during the lives of the parents, with remainder in fee simple to the children. The court, however, is limited in its power to the extent of the trust subject, and as the trust terminates with the lives of the parents, and the remainder is given to the children in fee, it has no power to extend the lien to the remainder in the land after the expiration of the trust estate. *Shirkey v. Kirby*, 455.

7. *Issue Out of Chancery—Discretion of Chancellor—Appeal—Case in Judgment.*—An issue out of chancery awarded merely to satisfy the conscience of the chancellor is advisory only, and if he is not satisfied with the verdict he may set it aside and award a new trial of the issue, or he may disregard it and proceed to decide the cause without the intervention of another jury. The discretion of the chancellor in awarding an issue, and likewise in approving or disapproving the verdict thereon of the jury, must be exercised upon sound principles of reason and justice, and is subject to review on appeal. In the case in judgment the written evidence is wholly inconsistent with the conclusion reached by the jury, and hence it was error in the trial court to have approved their verdict. *Carter v. Jeffries*, 735.

See APPEAL AND ERROR, 4, 5; ATTORNEY AND CLIENT, 2; FRAUDULENT CONVEYANCES, 1; INJUNCTIONS, 1; MINES AND MINERALS, 3; MISTAKE, 1; RAILROADS, 28, 29; REFORMATION OF INSTRUMENTS, 1; RESCISSION, 1; TAXATION, 8.

## ESTOPPEL.

1. *Decree Against Covenantor—Notice to Covenantor—Res Judicata.*  
It is a common practice to give notice to one bound by a covenant of title of the pendency of a suit involving such title, to appear and defend; and if upon such notice he fails or refuses to do so, he is as much bound by the judgment or decree in the case as if he had been formally impleaded. *Norfolk & W. R. Co. v. Mundy*, 422.
2. *Decree Against Grantee—Notice to Grantor.*—Where the grantor and grantee in a deed of conveyance are impleaded in the same suit to require them to restore to the plaintiff water rights previously granted to him by said grantor and subsequently diverted by said grantee, and the suit is dismissed as to the grantor on his motion and against the protest of the plaintiff,

the grantor is estopped to deny the binding effect of the decree made against his grantee. *Norfolk & W. R. Co. v. Mundy*, 422.

See CARRIERS, 2; INSURANCE, 1; JUDGMENTS, 4.

## EVIDENCE.

1. *Admissibility—General Objection.*—A general objection to evidence should be overruled if the evidence is admissible for any purpose. *Washington R. Co. v. Trimyer*, 856.
2. *Admissibility—General Objection.*—A general objection to testimony, some of which is proper and some not, should be overruled. *Hardy's Case*, 910.
3. *Admissibility—Self-Serving Declarations.*—A letter which is self-serving and written after all dealings between the plaintiff and the defendant have terminated is properly rejected as evidence. *Moore Lumber Corp. v. Walker*, 775.
4. *Authenticity of Paper—Stipulation of Counsel—Case at Bar.* The evidence in the case at bar sufficiently establishes the fact that a tax deed in the record which was objected to as not authentic, and as not evidence of the facts therein recited, was put in evidence on the trial under a stipulation of counsel that it might be introduced without preliminary proof that it was genuine and what it purported to be, and that what was referred to the court was its legal effect. *Wright v. Carson*, 498.
5. *Books of Original Entry—When Admissible.*—A book of entries, in which an entry is made in the usual course of business, at the time of the transaction, of matters within the personal knowledge of the bookkeeper, is admissible in evidence to show to whom goods were sold, where the bookkeeper is beyond the jurisdiction of the trial court. *Hardy's Case*, 910.
6. *Boundaries—Declaration of Parties—Suspicious Circumstances—Objections.*—Declarations of a party in interest, after a controversy has arisen with reference to a disputed boundary, which are made under suspicious circumstances, should not be received, if objected to; but if received without objection, they must be considered along with the other facts and circumstances tending to establish the boundary. *Pilkerton v. Roberson*, 136.
7. *Comparing Methods of Work—Rebuttal—Railroads.*—A defendant, who has made the plaintiff's witness his own on the subject of the best form of spark arrester, cannot object if the plaintiff, on re-examination, asks the witness whether or not the device used for arresting sparks by another company is preferable to that used by the defendant. *Norfolk & W. R. Co. v. Thomas*, 622.
8. *Contract in Writing—Parol Evidence to Vary—Incompleteness.* Where the correspondence between parties shows the entire

contract between them, no reference being made therein to any oral negotiations which were to be considered as entering into and forming a part of the contract, parol evidence will not be received to vary or alter the terms of such contract. The written contract cannot be proved to be incomplete by going outside and proving that there was an oral stipulation entered into and not embodied in the written contract. *Fentress v. Steele*, 578.

9. *Contradiction—Location of Dynamite Thawer.*—Defendant having introduced evidence tending to show that there was no other suitable place at which its dynamite thawer could have been placed than near the men at work, it was clearly competent for the plaintiff to contradict that evidence by testimony showing that there was a suitable place out of reach of the men at work. *Cook Mining Co. v. Thomas*, 369.
10. *Experiments—Negligence.*—It is impossible by tests subsequent to an accident, however faithfully they may be executed, to reproduce conditions as they actually existed. The mental attitude of the actors who know the positions of parties and what is to be expected is wholly different, and the case at last must be determined upon the evidence of the witnesses who were present upon the occasion of the accident, and who testify as to what they saw and heard of the actual occurrence. *Norfolk & W. R. Co. v. Sollenberger*, 606.
11. *Extension of Credit—Inquiry as to Financial Rating.*—Where the defendant has undertaken to show that the plaintiff had not, in the first instance, extended credit to him but had to another, it is permissible for the plaintiff to show that, pending the original negotiations, he enquired into the financial rating of the defendant. Such evidence is admissible to show that the plaintiff was relying on the defendant's credit and ability to pay, and not upon the credit or ability of another. *Fentress v. Steele*, 578.
12. *Inadmissibility—Offering Same Evidence—Waiver.*—If a party objects to the introduction of evidence which is admitted, and afterwards introduces the same evidence himself, it is not ground for reversing the judgment, although the evidence objected to was incompetent. *Moore Lumber Corp. v. Walker*, 775.
13. *Order of Introduction—Objection—Waiver.*—An exception to the action of the court in refusing to admit a letter in evidence at a particular stage of a case, but with notice that it may be offered later, is waived by a failure to offer the letter at a later stage of the proceedings. The order of introduction of evidence lies largely in the discretion of the trial court, whose ruling will not be reversed save in very exceptional cases. *Moore Lumber Corp. v. Walker*, 775.

14. *Partly Inadmissible—Instructions to Jury—Verdict.*—If a court permits an entire contract to be read to the jury, only parts of which are admissible in evidence, but instructs them that they are only to consider certain designated portions thereof, which are the admissible portions, it will be presumed that the jury obeyed the instructions of the court, and, in the absence of any evidence of prejudice to the rights of the parties in consequence of permitting the entire contract to be read to the jury, the verdict will not be set aside on that account. *Washington R. Co. v. Trimyer*, 856.
15. *Parol Evidence to Contradict Writing—Rights of Third Persons.*—The rule that parol evidence will not be received to vary, alter or contradict the terms of a valid written contract, is applicable only to controversies between the parties to the contract, or their privies. It cannot affect third persons. *Roselle v. Commonwealth*, 235.
16. *Parol Evidence to Vary Writing.*—Evidence of a contemporaneous parol agreement is not admissible to vary or contradict the terms of a valid written instrument, except in cases of fraud or mistake. This is an oft-repeated established axiom of jurisprudence. *Percy v. First National Bank*, 129.
17. *Railroads—Fires—Evidence—Number of Passing Trains.*—When the train which set fire to the plaintiff's house is not identified, and the train dispatcher of the defendant is on the stand as a witness for the defendant in an action to recover for the value of the house, it is entirely competent for the plaintiff to make him his witness for the purpose of showing what trains had passed the house at an opportune time for starting the fire. *Norfolk & W. R. Co. v. Thomas*, 622.
18. *Verdicts—Evidence—Inferences From Opinion of Witness—Case at Bar.*—The jury, in the case at bar, would not have been warranted in exonerating the plaintiff's intestate from the consequences of his gross contributory negligence by reason of the inferences drawn from the opinion of a witness who appears to have been in error as to the most essential condition upon which that opinion was predicated. *Norfolk & W. R. Co. v. Sollenberger*, 606.

See ADVERSE POSSESSION, 1; APPEAL AND ERROR, 11; CONTRACTS, 3; CRIMINAL LAW, 2, 4, 5, 6, 7, 8, 9, 12, 13, 17; DEATH BY WRONGFUL ACT, 4; EJECTMENT, 1, 2; EMINENT DOMAIN, 1; FRAUDULENT CONVEYANCES, 2; GIFTS, 1; LACHES, 1; MASTER AND SERVANT, 14; NEGLIGENCE, 6; PLEADING, 2; PRINCIPAL AND AGENT, 1; RAILROADS, 3, 4, 5, 10, 18, 20, 21, 22; REFORMATION OF INSTRUMENTS, 1; RESCISSION, 1; SPECIFIC PERFORMANCE, 3; STREET RAILWAYS, 1; WITNESSES.



**EXCEPTIONS.** See **APPEAL AND ERROR**, 5; **BILLS OF EXCEPTION**, 1, 4, 6.

**EXECUTORS AND ADMINISTRATORS.** See **SUBROGATION**, 1; **TRUSTS AND TRUSTEES**, 1.

**EXEMPTIONS.** See **STATUTES**, 2.

**EXPATRIATION.** See **TAXATION**, 10.

**EXPERIMENTS.** See **EVIDENCE**, 10.

**EXPERTS.** See **WITNESSES**, 4, 5, 6, 7.

**EXPRESS COMPANIES.** See **CARRIERS**, 1.

**FEE SIMPLE.** See **WILLS**, 1, 3.

**FIRES.** See **EVIDENCE**, 17; **RAILROADS**, 2, 3, 4, 5.

**FLOATABLE STREAMS.** See **NAVIGABLE WATERS**, 1.

**FORFEITURES.** See **DAMAGES**, 8, 9.

**FRAUD AND FRAUDULENT CONVEYANCES.**

1. *Equity Jurisdiction—Fraudulent Conveyances.*—A court of equity has jurisdiction of a bill by a creditor to clear away conveyances made by a husband, with the active participation of his wife, in order to hinder, delay and defraud his creditors. *Solenberger v. Strickler*, 273.
2. *Husband and Wife—Presumption—Rebuttal.*—In a contest between a wife and the creditors of her insolvent husband over property acquired during the coverture and conveyed to the wife, the presumption is, that the husband furnished the consideration, and that the property is his, but this presumption may be rebutted by proof, and is rebutted when it is shown that the husband could not, or that he did not, furnish the consideration, and that it must have emanated from a source other than the husband. *Miller v. Ferguson*, 222.
3. *Issue of Stock to Wife—Consideration.*—If it is shown that the husband furnished no valuable consideration for stock issued by a corporation to the wife, then his creditors could have suffered no injury by reason of the issuance of the stock to the wife, and even if it was erroneously or improperly done that furnishes no ground of complaint on the part of the husband's creditors. *Miller v. Ferguson*, 222.

4. *Rescission—Laches—Waiver.*—If a party intends to repudiate a contract on the ground of fraud, he should do so as soon as he discovers the fraud. If after the discovery of the fraud he treats the contract as a subsisting obligation, he will be deemed to have waived his right of repudiation. Prompt action is required when one believes himself entitled to a rescission of a contract. *Hagan v. Taylor*, 9.
5. *Spendthrift Trust—Settlement of Grantor Upon Himself—Exemption From Debts—Discretion of Trustee.*—The owner of property, even though a spendthrift, cannot convey his property to a trustee for his sole benefit for life, with power to dispose of the trust property at his death, and yet exempt the property from the payment of debts he may thereafter contract. The fact that the trustee is invested with discretion to withhold from such grantor all benefits arising under the trust does not alter the case. A spendthrift, as such, has no rights superior to those of other people. *Petty v. Moores Brook Sanitarium*, 815.

See CONTRACTS, 6; EVIDENCE, 16; GIFTS, 1; INSURANCE, 3; JUDICIAL SALES, 1, 2; PRINCIPAL AND SURETY, 1, 2.

#### FRAUDS, STATUTE OF.

1. *Consideration.*—The statute of frauds of this State does not require that the consideration for a contract for sale of real estate shall be stated in the writing, but expressly provides that it may be proved by evidence *aliunde*. *Virginian R. Co. v. Jeffries*, 471.
2. *Objections After Verdict—Waiver—Appeal.*—It is too late, after verdict, to object that the contract sued on was proved by parol testimony when the statute of frauds required it to be in writing. The failure to object at the proper time is a waiver of the statute, and the case must be heard and determined in the appellate court upon the same evidence upon which it was heard and determined in the trial court. *Moore Lumber Corp. v. Walker*, 775.
3. *Parol Contract for Sale of Land—Code, Sec. 2840.*—Section 2840, clause 6, of the Code renders parol contracts for the sale of real estate *voidable only* and not *void*. *Hurley v. Hurley*, 31.
4. *Sale of Standing Trees.*—A contract for the sale of trees and their immediate removal is a contract for the sale of personal property, and so is not within the statute of frauds. *Hurricane Lumber Co. v. Lowe*, 380.

See STANDING TREES, 2, 3; TRESPASS, 2.

**GIFTS.**

1. *Burden of Proof—Issue Out of Chancery.*—Where a suit in chancery is brought by an executor to recover the possession of bonds of his testator in the hands of one who claims them as a gift from the testator in his lifetime, and an issue out of chancery is ordered to ascertain whether or not there was a completed gift, and whether the testator was induced to make the gift by fraud or undue influence, the burden of proof is on the claimant of the bonds to show that he holds them by virtue of a completed gift made in good faith. *Ewan v Louthan*, 575.

**GRAND JUROR.** See WITNESSES, 2.

**GROUND OF DEFENSE.** See APPEAL AND ERROR, 14; PLEADING, 13.

**GUARANTY.**

1. *Consideration.*—Furnishing money to a third person at the instance of one who guarantees its payment is a sufficient consideration for the guaranty. *Moore Lumber Corp. v. Walker*, 775.

**HIGHWAYS.** See LIMITATION OF ACTIONS, 1; RAILROADS, 6, 7, 8, 28, 29.

**HOMESTEADS.**

1. *Property Fraudulently Conveyed—Claim by Widow and Children—Vendor's Lien—Discharge—Subrogation.*—Where property has been conveyed, directly or indirectly, by a husband to his wife, and the conveyance has been set aside at the instance of his creditors on the ground of fraud or want of consideration, the Constitution of this State and the statute passed in pursuance thereof declare that the householder shall not be entitled to claim a homestead exemption in the property so conveyed; and as he cannot claim such homestead in his lifetime, his widow and children cannot claim it after his death, as their homestead rights and privileges in his property cannot be any greater than he himself had. But where it appears that the wife has been guilty of no actual fraud, and that she has, out of her own means, discharged a purchase-money lien on the property, the lien will be treated as in force for her protection, and she will be subrogated to the rights of the lienor, and be repaid the amount of the lien out of the proceeds of the sale of the property. *Dickenson v. Patton*, 5.

**HOMICIDE.** See CRIMINAL LAW, 2, 5, 7, 8, 9, 11, 12, 13, 17.

**HUSBAND AND WIFE.**

1. *Contingent Right of Dower—Purchase of Debts Against Husband.*—A married woman may lawfully sell her contingent

right of dower in her husband's land and use the purchase money to acquire judgments against her husband. *Miller, I. M. v. Ferguson*, 222.

2. *Joint Purchase of Land—Conveyance to Wife—Husband's Interest in Property.*—Where property was purchased by husband and wife jointly, but was conveyed to the wife alone, and was afterwards sold and conveyed to a purchaser who executed his note or bond for the balance of the purchase money to them jointly, a *prima facie* case is made entitling the husband to one-half the balance of the purchase price, notwithstanding the fact that the title, in the first instance, was conveyed to the wife only. *Brown v. Orr*, 1.

See FRAUDULENT CONVEYANCES, 2, 3.

HYPOTHECATION. See ASSIGNMENTS, 2.

INDICTMENTS. See CRIMINAL LAW, 16.

INFANTS. See RAILROADS, 11; VENDOR AND PURCHASER, 4.

INJUNCTIONS.

1. *Collection of Purchase Price of Land—Defective Title.*—Equity will enjoin the collection of the purchase money of land on the ground of defect of title, after a vendee has taken possession under a conveyance from his vendor with general warranty, if the title is questioned by a suit either prosecuted or threatened, or if the purchaser can show clearly that the title is defective. *Pack v. Whiteacre*, 122.
2. *Illegal Tax—Voluntary Payment—Moot Questions—Dismissal—Jurisdiction.*—Upon a pure bill of injunction to enjoin the collection of a tax, the voluntary payment of the tax pending the proceeding and before a final decree destroys the whole ground for the equitable relief prayed, and puts an end to the case. There is nothing left to support the proceeding, and the preliminary injunction granted on the filing of the bill should be dissolved, and the bill dismissed without prejudice. It is immaterial that the parties agree that the suit shall go on to final decree, and that if decided in favor of the taxpayer the officer will refund. Consent does not confer jurisdiction in such a case, and courts will not decide purely moot questions. Whenever there is no actual controversy involving real and substantial rights between the parties to the record the case will be dismissed. *Thomas, Andrews & Co. v. Norton*, 147.

See EQUITY, 2; MINES AND MINERALS, 3; TAXATION, 8.

**INSANE PERSONS.**

1. *Action for Support—Liability at Common Law.*—The right of action against the estate of a lunatic for passed expenses incurred in supporting him in one of the State's hospitals exists only by the statute imposing a personal liability for such support. At common law no such right existed, in the absence of express contract. *Brown v. Western State Hospital*, 321.
2. *Action for Support—Remedy Withdrawn by Act of 1908.*—The purpose and intent of the act of Assembly approved March 16, 1908 (Acts 1908, p. 687), was to declare that thereafter no claim, not reduced to judgment, for the maintenance and support of insane persons committed, before or after the passage of the act, to an insane asylum or hospital of the State, should be collected. The plain intent of the legislature was to deal alike with all citizens of the State committed to either of the several hospitals established for their care and comfort, and to put them all in the same class; and while the language of the act imports future operation and effect, it destroys the remedy for the recovery of such claim, deals fully with the subject, and expressly repeals all former acts or parts of acts in conflict therewith. *Brown v. Western State Hospital*, 321.

See STATUTES, 1.

**INSTRUCTIONS.**

1. *Contradiction—Verdicts.*—If contradictory instructions are given on a material point in a case, the verdict of the jury should be set aside, as it cannot be said whether the jury were controlled by the one or the other. *Atlantic Coast Line v. Caple*, 514.
2. *Different Phases of Case—Evidence to Support Each.*—Where the pleadings present several views of a case, and there is evidence tending to establish each sufficient to support the verdict of a jury, it is proper to instruct the jury on each view. *Arents v. Commonwealth*, 509.
3. *Different Theories—How Presented.*—It is not error to give an instruction which states only the plaintiff's theory of a case, where other instructions given for the defendant fully state his theory, and the jury are told that the instructions given in the case are the instructions of the court, and must all be read together. *Danville v. Thornton*, 541.
4. *Directing Verdict—Relative Duties of Both Parties.*—In an action of tort, where the contributory negligence of the plaintiff is relied upon as a defense, it is the better practice that instructions which lay down the law as to the duty of the defendant should not conclude with a direction to find for the

- plaintiff unless they also contain a statement of the corresponding duty of the plaintiff to exercise reasonable care for his own safety. *Atlantic Coast Line v. Caple*, 514.
5. *Evidence to Support—Case at Bar—Accidental Death—Freedom of Decedent from Fault.*—Where, in an action for wrongful death, there is ample evidence to support the theory that the death of plaintiff's intestate was purely accidental, and not the result of the defendant's negligence, an instruction which tells the jury they must find for the defendant if they believe from the evidence that the decedent came to his death as the result of a mere accident, although he was himself free from fault, should be given. To add to such instruction: If the accident was "not caused in any manner by the defendant's fault or negligence" is calculated to confuse and mislead the jury, if not to defeat the purpose of the instruction. *Atlantic Coast Line v. Caple*, 514.
  6. *Invited Error.*—If proper instructions have been given at the instance of a plaintiff upon the several phases of his case as presented by the pleadings and proofs, and thereafter an instruction, inconsistent with the plaintiff's instructions, is given at the instance of the defendant, the latter cannot complain thereof, as the error was invited by him. *Arents v. Commonwealth*, 509.
  7. *Jury Fully Instructed.*—It is not error to refuse to instruct on a point already sufficiently covered by other correct instructions given in the case. *Ches. & O. R. Co. v. Ghee*, 527.
  8. *Jury Sufficiently Instructed.*—It is not error to refuse to give further instructions to a jury who have already been fully and fairly instructed. *Virginian R. Co. v. Jeffries*, 471.
  9. *Negligence and Contributory Negligence—Conflicting Evidence.* Where, in a personal injury case, the evidence is conflicting both as to the negligence of the defendant and the contributory negligence of the plaintiff, it is proper to instruct the jury on each of the points. *Ches. & O. R. Co. v. Christian*, 723.
  10. *Partial View of Evidence—Directing Verdict—Contributory Negligence.*—Where the contributory negligence of the plaintiff is relied on as a defense to an action of tort, and the evidence tends to support that view of the case, it is error to instruct the jury to find for the plaintiff if they believe that the defendant was negligent, ignoring entirely the contributory negligence of the plaintiff. An instruction, especially one directing a verdict for the plaintiff or the defendant, which is based upon a partial view of the evidence, is erroneous and should not be given. *Atlantic Coast Line v. Caple*, 514.
  11. *Referring Questions of Law to the Jury.*—It is error for the trial judge to refer to the jury the determination of a question of law raised by a hypothetical case stated in an instruction. *Houff v. German Ins. Co.*, 585.

12. *Taking Case From Jury—Insufficient Evidence.*—It is not error to grant an instruction which takes away from the jury the consideration of evidence which is not sufficient to support a verdict found in accordance therewith. *Pilkerton v. Roberson*, 136.

See APPEAL AND ERROR, 6, 7, 10, 16, 17, 19; CONTRACTS, 9; DEATH BY WRONGFUL ACT, 1; EVIDENCE, 13; MASTER AND SERVANT, 6, 11, 13, 23; RAILROADS, 19.

#### INSURANCE.

1. *Benefit Societies—Application for Membership—False Statements Induced by Officers of Society—Estoppel.*—An applicant for membership in a mutual benefit society does not become a member until the delivery of the certificate of membership, and is not presumed to know the constitution and by-laws of the society, and if he is induced to join by false and misleading representation by the officers and agents of the society as to the purport and effect of certain questions in the application for membership, and in consequence thereof makes, or assents to, answers to such questions which both he and they know to be false, and he is accepted as a member and pays his dues, the society cannot, after loss, set up the falsity of the answers to such questions as a ground for avoiding liability on its certificate. *Modern Woodmen v. Lawson*, 81.
2. *Cancellation of Policy—Misrepresentation of Agent.*—Where an insurance agent, by misrepresentation, secures from the wife of assured, in his absence, possession of a policy, and cancels it of his own initiative, and fails to give the assured five days' notice of such cancellation as required, before the fire, the policy must be regarded as in full force and effect at the time of the fire. *Homestead Ins. Co. v. Ison*, 18.
3. *False Statements in Application as to Health.*—A false statement made in an application for insurance concerning a mere temporary indisposition, not affecting the general health or constitution of the appellant, will not vitiate the policy, unless it be clearly proved that the statement was wilfully false, or fraudulently made, or was material. The fact that the answer was merely untrue is not sufficient, under the statute of this State to vitiate the policy. *Modern Woodmen v. Lawson*, 81.
4. *Forfeiture—Restrictive Provisions of Policy—Size of Type—Inequitable Claim of Assured.*—Where an insurance company is seeking to escape liability for the surrender value of its policy on the ground that the policy was not surrendered within the time prescribed by a provision of the policy, it is not inequitable for the beneficiary, while claiming the surrender value under that same provision, to insist that the time limit fixed

by the provision shall be excluded because not printed in type of the required size nor written with pen and ink in or on the policy. This is not a violation of the maxim that "he who seeks equity, must do equity." *Equitable Life Soc. v. Wilson*, 571.

5. *Inventory—Lump Sums—Gross Items.*—An inventory is an itemized list or enumeration of property, article by article. A mere statement of articles, put down in lump sums, or entire bills put down at a gross sum, with no statement of the several articles named, or of the quality or cost price is not an inventory within the meaning of the "Iron safe clause" of fire insurance policies. *Phoenix Ins. Co. v. Sherman*, 435.
6. *Iron Safe Clause—Account Books—Bank Book.*—A bank book in which is credited to the assured (a mercantile firm) all money collected during the existence of a policy of insurance, whether from accounts made prior to the inventory or for cash sales thereafter, moneys collected by one of the assured from a separate business, and moneys given to the assured by persons who desired him to give checks for their use, does not constitute a book showing clearly and plainly such a complete record of all sales and shipments, both for cash and credit, as is required by the "iron safe clause" of the fire insurance policy sued on in this action. *Houff v. German Ins. Co.*, 585.
7. *Iron Safe Clause—Character of Books Required.*—A substantial compliance with the requirements of a fire insurance policy, including the "iron safe clause" is all that is necessary. Books need not show articles sold if they show the amounts for which they are sold, nor the prices if the articles are shown; nor is it necessary to show whether they were sold for cash or on credit. But if a large business is conducted, and sales made both for cash and on credit, and these are commingled, without any distinguishing mark or token, it is inconceivable that "a complete record of the business transacted" can be kept. The books should be such as will enable the insurer to ascertain with substantial certainty and definiteness the value of the goods destroyed by fire, otherwise they do not comply with the "iron safe clause." *Phoenix Ins. Co. v. Sherman*, 435.
8. *"Iron Safe" Clause—Bookkeeping.*—The bookkeeping required by the "iron safe" clause in fire insurance policies begins from the date of the inventory which the assured is required to take. *Homestead Ins. Co. v. Ison*, 18.
9. *Iron Safe Clause—Inventory—Books—Case at Bar.*—If an inventory taken prior to the date of an insurance policy is relied upon as a compliance with the "iron safe clause," then the assured must also keep a set of books from the date of the inventory, and during the continuance of the policy, showing a



complete record of the business transacted in order to comply with the terms of that clause. In the case at bar, the book offered in evidence does not comply with this requirement, and, in fact, is just such a book as might have been written up at one time after the fire. *Phoenix Ins. Co. v. Sherman*, 435.

10. *Iron Safe Clause—Inventory—General Footings—Without Items.*—General footings of the value of each line of goods in a stock, taken from an itemized statement (not produced) of all of each line of such goods, without showing the items or their values, is not such a complete itemized inventory of the stock of goods on hand as is required by the “iron safe clause” of the fire insurance policy sued on in this action. *Houff v. German Ins. Co.*, 585.
11. *Iron Safe Clause—Object of.*—The “iron safe clause” found in all policies of insurance on shifting stocks of merchandise requires the insured to take certain inventories and to keep certain books. There is nothing unreasonable in its requirements. Under it the insurer has the right to such a compliance with its terms as will fairly and intelligently inform him during the life of the policy as to the stock carried by the assured, and, in case of fire, as to the stock burned and the fair cash value thereof; and it is no hardship upon the assured to comply with this requirement of his policy. *Phoenix Ins. Co. v. Sherman*, 435.
12. *Policy—Date of Issue.*—The time date of issue of the policy in the case in judgment is the day when it was delivered and accepted. Then it was that the minds of the parties met for the first time upon the terms of the contemplated contract. “Issued,” in this connection, means when the policy is made and delivered, and is in full effect and operation. *Homestead Ins. Co. v. Ison*, 18.
13. *Policy—“Issuance”—Inventory.*—Where the assured is required to take an inventory of his stock within thirty days from the issuance of a policy, the time date of issuance is the day of delivery of the policy to the assured, and he has the whole thirty days in which to take the inventory without availing his policy. *Homestead Insurance Co. v. Ison*, 18.
14. *Powers of Agent—Limitations of Policy.*—It is a matter of common knowledge that the business of insurance companies is necessarily transacted through agents, and they are presumed to know better than the public with whom they deal the requirements of their companies. Consequently, an applicant for insurance has a right to depend upon the superior knowledge of the agent, and, in the absence of notice of limitations upon his powers, to assume that his authority is commensurate with the nature of the employment, and in good faith to act

upon the information imparted by the agent, and to follow his instructions in all matters pertaining to the preparation of the application. *Modern Woodmen v. Lawson*, 81.

15. *Premiums—Credit Given by Agent.*—A general agent of an insurance company who is entrusted with policies duly signed by the officers of the company, and who has power to countersign and deliver such policies, and who is responsible to the company for the premiums and collections on all policies issued by him, binds the company by an agreement to extend credit to the insured, especially when there is no provision to the contrary in the policy. *Homestead Ins. Co. v. Ison*, 18.
16. *Restrictive Provisions of Policy—Size of Type.*—Under the terms of the statute (Code, sec. 3252) an insurance company cannot defeat recovery on a policy by reliance upon conditions or restrictive provisions thereof not printed in type of the size required by the statute, nor written with pen and ink in or on the policy. *Equitable Life Soc. v. Wilson*, 571.
17. *Separation of Damaged Goods—Effect of Failure to Separate.*—The provision of the policy of insurance in this case requiring the assured, after the fire, to separate the damaged and undamaged goods is merely directory, and a failure to comply with it does not avoid the policy, but only has the effect of reducing the recovery by such amount as was lost to the company by the failure to comply. *Homestead Ins. Co. v. Ison*, 18.

See INTOXICATING LIQUORS, 4.

#### INTERSTATE COMMERCE.

1. *Sale of Property Already in State.*—The test applied to determine whether personal property sold is to be regarded as belonging to interstate or to intrastate commerce is whether or not the property which is the subject of the sale is within the jurisdiction of the State at the time the sale is made. If it is, then it is an intrastate transaction, and subject to State regulation. *Roselle v. Commonwealth*, 235.

#### INTOXICATING LIQUORS.

1. *"Byrd Liquor Law"—Constitutionality—"Malt Beverages."*—The object of section 23½ of the act of Assembly approved March 12, 1908, commonly called the "Byrd Liquor Law," was to regulate and control the sale and distribution of the by-products of the brewery commonly known as "malt beverage," sometimes called "Small Brew" and "Near Beer." The legislature clearly has the power to enact such a statute, as well under the comprehensive provisions of section 62 of the Constitution as under the general police powers of the State, and

its provisions are not oppressive or unreasonable. Whether such a statute is wise and proper or not, is a question for the legislature, and not for the courts to determine. *Henry's Case*, 879.

2. *Sale—Regulation—Police Power.*—The regulation of the sale of intoxicating liquors is completely within the police power of the State, and may be exercised in such manner as the legislature deem proper. It may be entirely prohibited, or such restraints may be placed as the legislature thinks wise, without supervision or control by the courts. If, for the purpose of preventing evasion, or the fostering of an appetite for stronger liquors, the legislature deem it wise to forbid the sale of any alcoholic admixture, by whatever name it may be called, it has ample power to do so. *Henry's Case*, 879.
3. *Sale—Regulation—Police Power—Constitutional Law.*—The regulation of the sale of intoxicating liquors is a police regulation, and the power of the State over such regulations is supreme. Section 23½ of the "Byrd Liquor Law" is not, therefore, in conflict with amendment fourteen of the Constitution of the United States, nor of any other provision of said Constitution. *Henry's Case*, 879.
4. *Wood Alcohol—Poison.*—Wood alcohol is a narcotic poison, and one who is killed by drinking wood alcohol by mistake for grain alcohol cannot be said to have died by the intemperate use of intoxicating liquors. *Modern Woodmen v. London*, 81.

See CONSTITUTIONAL LAW, 1; CRIMINAL LAW, 16.

INVENTORY. See INSURANCE, 8, 9, 10, 11.

ISSUANCE. See INSURANCE, 12, 13.

ISSUE OUT OF CHANCERY. See APPEAL AND ERROR, 18; EQUITY, 7; GIFTS, 1.

JOINT ACTIONS. See NEGLIGENCE, 5; PLEADING, 14, 15.

JOINT RESOLUTIONS. See STATUTES, 3.

JOINT TORT FEASORS. See MINES AND MINERALS, 2; NEGLIGENCE, 5.

JUDGMENTS.

1. *Courts—General Jurisdiction—Special Powers—Collateral Attack on Judgment.*—When a court of general jurisdiction acts within the scope of its general powers, its judgment will be presumed to be in accordance with its jurisdiction, and cannot be assailed collaterally. So also, if it has special powers con-

ferred upon it by statute, which are to be and in fact are exercised judicially, and not merely ministerially, its judgment cannot be collaterally impeached. It is where a court of special jurisdiction has conferred upon it special powers by special statutes, which are only exercised ministerially and not judicially, that no presumption of jurisdiction will attend its judgment, and the facts essential to the exercise of special jurisdiction must appear on the face of the record. *Bryan v. Nash*, 329.

2. *Office Judgments—Proceedings After Finality—Waiver.*—All proceedings in an action at law after an office judgment in favor of the plaintiff has become final are a nullity, or should be set aside so as to give the plaintiff the benefit of the final judgment in his favor. The fact that the plaintiff took issue on a plea filed after the office judgment became final, and also asked for a continuance, do not constitute a waiver of the final judgment in his favor. *Gring v. Lake Drummond Land Co.*, 754.
3. *Office Judgments—When Final—Quarterly Terms of Circuit Courts.*—An office judgment entered in the clerk's office of a circuit court becomes final on the adjournment of the next succeeding term of the court, or on the fifteenth day thereof, whichever first happens, unless previously set aside upon a plea in bar filed by the defendant. The fact that the judges of the circuit courts are authorized to designate four of the terms required by law to be held as quarterly terms, at which all civil cases for which juries may be required shall be tried, does not extend the time within which the defendant must have the office judgment against him set aside. The legislature has not changed the statute in this respect as to cases pending in circuit courts, though it has as to cases pending in corporation courts, and the courts cannot, by construction, read into the statutes words that the legislature has not placed there. *Gring v. Lake Drummond Land Co.*, 754.
4. *Res Judicata—Dismissal for Variance Between Allegation and Proof.*—Where suit is brought to quiet the title to land alleged to have been acquired by adverse possession, and it is shown that the title was not so acquired, but, if acquired, it was by deed from certain of the defendants, and the suit is dismissed from the docket solely on that account, the effect of the order of dismissal is to leave the parties just where they were before the suit was brought, with all rights then enjoyed by either party with respect to the deed unaffected and unimpaired by the suit. It is not a determination of the rights of the parties to the deed, and does not bar the grantees in the deed from setting it up against their grantor in a suit brought by him for the partition of the property conveyed. *Taylor v. Headrick*, 461.

5. *Revival—Jurisdiction on Scire Facias—Matters Outside Jurisdiction—Collateral Attack—Liens.*—The extent of the jurisdiction of the court upon a proper writ of *scire facias* to revive a judgment is to render judgment that the plaintiffs in the writ may have execution of the judgment set forth in the writ. All beyond this is outside of the jurisdiction of the court and a mere nullity, and it may be so treated by any court in any proceeding, direct or collateral. If the judgment on the *scire facias* goes further and besides awarding execution on the original judgment awards the payment of money, the latter is void for want of jurisdiction and may be assailed collaterally. A judgment of revival merely is not a lien on land, though the judgment revived will constitute such lien. *White v. Palmer*, 490.
6. *Revival—Scire Facias—Must Recite Judgment.*—The sole order which can be properly entered upon a *scire facias* to revive a judgment is that the plaintiff may have execution upon the judgment. The writ is the only pleading in the proceeding and must recite the judgment to be revived. A *scire facias* upon a *scire facias* which neither recites nor makes any reference to the judgment to be revived is not sufficient to revive the judgment. It fails to aver facts essential to the jurisdiction of the court, and the judgment of revival is a mere nullity which may be treated as if it never existed. *White v. Palmer*, 490.
7. *Revival—Scire Facias.*—The proceeding by *scire facias* in this State is not a new suit, but a continuation of the old suit. Its object is to obtain execution of a judgment which has become dormant by the lapse of time, and it is essential that the writ, which serves the double purpose of a writ and a declaration, shall state all the facts necessary to authorize the relief sought. It should follow the judgment to be revived as to the amount, date, and parties. *White v. Palmer*, 490.
8. *Revival—Scire Facias—Irregularity—Collateral Attack.*—An irregular or erroneous *scire facias* to revive a judgment is voidable only, and if the irregularity is not taken advantage of in some appropriate method, the judgment of revivor is valid. It cannot be collaterally assailed, and will support title derived from an execution issued by its authority. *White v. Palmer*, 490.
9. *Revival of Decrees—Scire Facias at Law.*—A decree is the result of a suit in chancery, and is placed by statute on the same footing with a judgment. A *scire facias* to revive it is strictly a legal process, and, if regular in other respects, is not invalidated because sued out on the law side of the court instead of the chancery side. *White v. Palmer*, 490.

See ESTOPPEL, 1, 2; PLEADING, 3; RES JUDICATA, 1. 2; WILLS, 4.

JUDGMENT NON-OBSTANTE VEREDICTO. See PLEADING, 17.

### JUDICIAL SALES.

1. *Confirmation—Excessive Quantity—Objection—Laches.*—If parties to a suit know or ought to know that a tract of land designated in the record and the decree for sale as the "ten-acre tract" in fact contains thirteen acres, and permit it to be sold as ten acres, and the sale confirmed without objection, they cannot thereafter hold the purchaser liable for the excess, as for a sale by the acre merely because the tract was spoken of as the ten-acre tract, in the absence of any evidence of fraud, misrepresentation or mistake as to the quantity sold, or of any belief on the part of the purchaser at the time of sale that the boundary contained any more than was represented. *Blakemore v. Roller*, 719.
2. *Confirmation—Variation in Quantity of Land—Reservations After Confirmations.*—No increase or abatement of the purchase price of land sold at a judicial sale will be permitted for excess or deficiency in quantity after a confirmation of such sale, except in cases of fraud, misrepresentation, or mutual mistake. After such confirmation, a reservation in a subsequent decree for a deed to the purchaser of the right to proceed against him for excess in quantity of the land sold is ineffectual to affect the rights of such purchaser.—*Blakemore v. Roller*, 719.
3. *Right of Purchaser Before Confirmation—Removal of Encumbrances—Parties.*—Although the doctrine of *caveat emptor* applies to judicial sales, nevertheless, a purchaser in good faith at such a sale is entitled to a marketable title, and will not be compelled to accept a defective title if objection on account of such defects be made before confirmation. If the objection be that there are encumbrances on the land, the encumbrancers should be brought before the court and their rights determined. They cannot be determined in the absence of the parties in interest. *Kirk v. Oakey*, 67.

JURISDICTION. See INJUNCTIONS, 2.

JURY. See CRIMINAL LAW, 11, 15, 18, 19; VERDICTS, 3; WITNESSES, 2.

LABOR LIENS. See ASSIGNMENTS, 3.

### LACHES.

1. *Action Within Statutory Period—Evidence.*—If an action to recover for burning plaintiff's house be brought within the statu-

tory period, the causes of delay in bringing and prosecuting the action, and the time at which an insurance company intervened to claim the recovery, if any, are irrelevant and immaterial on the issue of the defendant's liability for the burning. *Norfolk & W. R. Co. v. Thomas*, 622.

See FRAUDULENT CONVEYANCES, 4; JUDICIAL SALES, 1, 2; LIMITATION OF ACTIONS, 1; RESCISSION, 1.

LAND. See VENDOR AND PURCHASER, 6.

LAST CLEAR CHANCE. See RAILROADS, 10, 18, 20, 21, 24.

LICENSEES. See RAILROADS, 9, 20, 21.

#### LICENSES.

1. *Equality—License Taxes.*—The provisions in the Constitution requiring equality and uniformity of taxation apply only to a direct tax on property, and not to license taxes, which do not admit of a tax strictly equal and uniform in the sense contended for. This is clear from sections 168 and 170 when read together. *Bradley v. Richmond*, 521.
2. *Municipal Corporations—License Tax—Ad Valorem System—Section 170 of the Constitution.*—A city ordinance imposing a license tax on a private banker and also an *ad valorem* tax on the capital employed in his business is not prohibited by section 170 of the Constitution, which provides for the imposition of license taxes on any business that cannot be reached by the *ad valorem* system. *Bradley v. Richmond*, 521.
3. *Municipal Corporations—License Taxes—Classification—Illegality.*—It is competent for a city to classify different occupations for the purpose of imposing license taxes, and, in order to render a classification illegal, the party assailing it must show that the business discriminated against is precisely the same as that included in the class which is alleged to be favored. *Bradley v. Richmond*, 521.
4. *Municipal Corporations—License Tax—Equality and Uniformity.* A city ordinance which imposes the same license tax on all in the same class does not violate a charter requirement that taxes shall be equal and uniform upon all property, real and personal. *Bradley v. Richmond*, 521.
5. *Municipal Corporations—Taxation—License—Ad Valorem System.*—A municipal corporation, possessing general powers of taxation, must determine primarily whether a particular business can be reached by the *ad valorem* system, and its discretion in the matter cannot be interfered with by the courts except in a case of plain deviation from the constitutional re-

quirement. The question is one of power and not of policy so far as the courts are concerned. In the case at bar the imposition by the city of Richmond of a license tax of \$800 on the plaintiffs in error, as private bankers, cannot be said to be a plain deviation from the constitutional requirement. *Bradley v. Richmond*, 521.

See CONSTITUTIONAL LAW, 3, 7; NAVIGABLE WATERS, 2, 4; TAXATION, 9.

**LIENS FOR SUPPLIES.** See SHIPPING, 3, 5, 6; UNITED STATES, 3, 4, 5.

#### LIMITATION OF ACTIONS.

1. *Public Rights—Statute of Limitations—Laches.*—Public highways belong to the State, and the statute of limitations does not run against the rights of the public therein, nor does the doctrine of *laches* apply. As against the government, *laches* cannot be set up as a defense in equity any more than the bar of the statute can at law. Time does not run against the State, nor bar the rights of the public. *Norfolk & W. R. Co. v. Supervisors*, 95.

See LACHES, 1.

**LIQUIDATED DAMAGES.** See DAMAGES, 8, 9.

#### LOGS AND LOGGING.

1. *Standing Trees—Conveyance—Time of Removal—Reasonable Time—Case in Judgment.*—The owner of land conveyed to a manufacturing company all the pine timber standing upon the land that would measure twelve inches in diameter across the stump at the time of cutting, with the right, for a period of five years from the date of the deed, to cut and remove the same, and, if not cut and removed within said time, the further right to extend the time for cutting and removing for such further time as the grantee might desire, upon payment of interest at six *per cent. per annum* upon the price agreed to be paid for trees.

*Held:* 1. It was not the intention of the parties to give an absolute and unconditional title to the timber, but only such as was cut and removed within the time limited by the deed, and such extensions thereof as the grantee was entitled to demand upon a fair construction of the deed, or as might be agreed upon by the parties.

2. The grantee has not a wholly indefinite period in which to cut and remove the timber which it has purchased, but must



cut and remove it within a reasonable time after the expiration of the fixed period.

3. The question of what is reasonable time is one of fact dependent on the circumstances of each case. The rights of the grantor are not to be measured by the convenience or inconvenience, the ability or inability of the grantee, caused by and resulting from the magnitude and extent of its business, and its numerous other contracts to which the grantor is a stranger. In the case at bar, one year from the certification of the decree of this court to the circuit court is a reasonable time. *Wright v. Camp Man. Co.*, 679.

See NAVIGABLE WATERS, 1.

LOST GOODS. See CARRIERS, 1, 2.

LUNATICS. See INSANE PERSONS.

MARITIME LIENS. See SHIPPING, 3. 5.

MARKETABLE TITLE. See JUDICIAL SALES, 1.

MARRIED WOMEN. See FRAUDULENT CONVEYANCES; HUSBAND AND WIFE, 1.

MASTER AND SERVANT.

1. *Assumption of Risk*.—Where a miner has reported to the “bank boss” the unsafe condition of the mine, and the latter inspects the mine and professes to have made the mine safe, and tells the miner that he can safely return to work in the mine, the miner has the right to rely upon such assurance, and if he does rely upon it and returns to work in the mine he does not assume the risk of working therein. *Virginia Iron Co. v. Massey*, 156.

2. *Assumption of Risk—Notice of Dangers*.—The rule which requires the master to inform his servant of the dangers ordinarily incident to the service, and if he fails to do so and the servant has no opportunity to learn them, the servant will not be held to have assumed the risks not obvious to one of his age, experience and judgment, only applies where there is a danger known, or which ought to be known, to the master, of which the servant, on account of his youth or inexperience, is ignorant, and which he cannot reasonably be expected to discover by the exercise of ordinary care. *Jacoby Co. v. Williams*, 55.

3. *Notice of Dangers—Obvious Dangers—Presumption*.—A master is under no obligation to warn an adult servant of sound mind

of the existence of dangers that are visible to any man of ordinary intelligence, though not an expert, and which he could not fail to see and comprehend. The master has the right to assume, in the absence of evidence to the contrary, that such a servant has ordinary intelligence and capacity, and is possessed of the instinct of self-preservation. *Jacoby Co. v. Williams*, 55.

4. *"Bank Boss"—Vice-Principal.*—A "bank boss," when inspecting a mine to ascertain if it is a safe place for miners to work in, is discharging a non-assignable duty of the master, and is a vice-principal, and not a fellow-servant of such miners. *Virginia Iron Co. v. Munsey*, 156.
5. *Happening of Accident—Presumption—Negligence.*—Negligence of the master resulting in injury to his servant cannot be inferred from the mere occurrence of an accident. The presumption is that the master has discharged all of his legal duties to his servant, and this presumption can only be overcome by affirmative proof. In order to hold a defendant liable for a negligent injury, there must be affirmative and preponderating proof of the defendant's negligence. *Jacoby Co. v. Williams*, 55.
6. *Instructions—Evidence to Support.*—An instruction defining the duty of one who has placed another in a position of peril is clearly erroneous where there is no evidence which proves or tends to prove that the injured party was placed in a position of peril by any act of commission or omission on the part of the person sought to be held liable for the injury. *Ches. & O. R. Co. v. Ghee*, 527.
7. *Methods of Work—Presumption.*—In the absence of evidence to the contrary, it will be presumed that the methods of work adopted by a master are proper and sufficient. *Jacoby Co. v. Williams*, 55.
8. *Mutual Duty of Care—Ordinary Work.*—An employee working in a tunnel from time to time filled with smoke from passing trains is engaged in work which is ordinary as regards the relation of employer and employee to each other, and the one is as much required to exercise care commensurate with the danger of the situation as the other. *Ches. & O. R. Co. v. Ghee*, 527.
9. *Negligence—Proof Required—Case at Bar.*—Negligence must be established by affirmative evidence which must show more than a mere probability of a negligent act. The existence of negligence must not be left wholly to conjecture, but the evidence must be such as to satisfy reasonable and well balanced minds that the injury complained of resulted from the negligence of the defendant. Moreover, in seeking to charge a

master, it must be borne in mind that he is not compelled to foresee and provide against that which reasonable and prudent men would not expect to happen. Nor can the negligence of the master be inferred from the mere occurrence of an accident by which his servant is injured. That fact alone does not raise even a *prima facie* presumption that the master has been guilty of negligence or a breach of duty to his servant. In the case at bar the evidence shows that the plaintiff's injuries resulted from a pure accident which could not have been anticipated or provided against by reasonably prudent men. *Norfolk & W. R. Co. v. Witt*, 117.

10. *Place of Danger—Voluntary Act of Servant.*—A servant of mature years who volunteers to go to a particular place of danger on the occasion of his injury cannot complain that he was sent out of his regular employment into a place of danger. *Jacoby Co. v. Williams*, 55.
11. *Railroads—Negligence—Employee Asleep on Track—Contributory Negligence.*—Although an employee of a railroad company may have been on duty for forty-eight consecutive hours, it is none the less contributory negligence on his part to fall asleep on a railroad track in daily use. His folly, or misfortune, however, would not excuse the railroad company in inflicting an injury upon him if it knew, or, by the exercise of reasonable care after it was put on notice, could have known, the peril in which he stood. In the case at bar the evidence does not establish negligence on the part of the railway company. *Norfolk & W. R. Co. v. Sollenberger*, 606.
12. *Railroads—Personal Injury—Instructions—Partial View of Evidence.*—Where an employee of a railroad company is killed in a tunnel rendered so dark by the smoke from a passing train that a lantern would cast a light only a few feet, an instruction which points out with particularity the care and precautions owing by the company, but ignores the duty that rested upon the decedent to exercise a higher degree of care for his own safety than under ordinary conditions, is erroneous and should not be given. *Ches. & O. R. Co. v. Ghee*, 527.
13. *Railroads—Warnings—Customary Warnings—Reasonable Precautions.*—Where, in an action against a railroad company to recover for the death of an employee alleged to have been occasioned by the failure to give proper warning of the approach of one of its trains through a tunnel filled with smoke, the company asks an instruction that the jury shall find for the defendant if they believe that certain designated warnings were given, and these were the usual and customary warnings, it is not error for the court to add "and were in themselves reasonable precautions under all circumstances and facts of this

- case to be taken for the safety of employees working in the tunnel." *Ches. & O. R. Co. v. Ghee*, 527.
14. *Safe Appliances—Evidence—Railroads.*—The fact that the engine which inflicted the injury complained of passed several times over a particular portion of a railway track on the morning of the accident, without injury to the engine, track or crew, is a circumstance to be considered in determining whether or not the engine, or the roadway or track was in a reasonably safe condition for the use of employees of the company, but is not conclusive evidence of that fact. *Ches. & O. R. Co. v. Christian*, 723.
15. *Safe Appliances—Test of Negligence—Usage.*—The master is not obliged to furnish his servant with absolutely safe appliances, but to use ordinary care to furnish those that are reasonably safe, and among the latter class he has the right of selection. He is not an insurer of the safety of his servant. The unbending test of negligence in the selection of appliances is the ordinary usage of the business. *Southern R. Co. v. Lewis*, 847.
16. *Safe Place—Changing Conditions—Making Place Safe.*—The general rule that a master must use ordinary care to provide his servant a reasonably safe place in which to work does not apply to a place which is constantly changing by reason of the work being done, nor where the very work the servant is employed to do consists in making a dangerous place safe. *Jacoby Co. v. Williams*, 55.
17. *Safe Place—Comparative Safety—Evidence.*—It is the duty of a master to furnish his servant a reasonably safe place in which to work, not an absolutely safe place, nor the safer or safest place. It is not for the jury to compare places and determine which was the safer, but to determine whether the place furnished was reasonably safe. Nor is evidence admissible upon the relative safety of different places. *Va. Portland Cement Co. v. Seal*, 484.
18. *Safe Place—Duty of Servant—Case at Bar.*—While it is as much the duty of the servant to provide for his own safety from such dangers as are known to him, or as are discernible by ordinary care on his part, as it is the duty of the master to provide for him, yet, in the case at bar, it was the duty of the master to have provided against the accident which caused the injury to the servant, and the evidence fails to show that the servant neglected any duty which devolved upon him. The servant was injured by a rock falling on him from the roof of a mine, and the evidence is clear that the danger was known to the master, and that it was his duty to have propped the rock that fell upon the servant before sending him in the mine to work. The danger was a continuing one, and the place was

not rendered unsafe by any act on the part of the servant. *Virginia Iron Co. v. Munsey*, 156.

19. *Safe Place—Location of Switch Light—Usage of Railroads.*

Where it is sought to hold a railroad company liable for an injury inflicted on a brakeman by being struck by a switch light on a railroad yard, it is error to instruct the jury to find for the plaintiff if they believe that the injury resulted from placing the switch light in too close proximity to the track. This leaves the jury to determine, from their own judgment, what constitutes "in too close proximity," whereas the question is one of ordinary care on the part of the company in view of custom and usage of the business. *Southern R. Co. v. Lewis*, 847.

20. *Safe Place—Ordinary Care to Provide—Usage as Standard of Care.*

It is the duty of the master to use ordinary care to provide his servant a reasonably safe place in which to work. The duty is not absolute. He is not required to provide, but to use ordinary care to provide; and whether or not such care has been used is to be determined by the general usages of the business. The jury are not to be turned loose to fix a standard of care of their own, and thereby to dictate the customs and usages of business, but to determine whether the conduct of the master conforms to such custom and usage. If it does, the master is not negligent. He is responsible for the consequences of negligence, but not of mere danger. *Southern R. Co. v. Lewis*, 847.

21. *Safe Place—Promise to Change Place—Safety of New Place.*

If the master has promised his servant to change his place of work to a designated place evidence is admissible to show that that place is a safe place, but if it develops later that the master positively refused to make the change then evidence as to the safety of the new place is irrelevant. *Va. Portland Cement Co. v. Seal*, 484.

22. *Servant's Choice of Methods—Duty to Select Safe Method—Custom.*

Where there is a safe and an unsafe way of doing a piece of work, both of which are open and obvious, and it is the duty of the servant to select the method, he should select the safe method, and the fact that he has theretofore, without the knowledge of the master, used the unsafe method will not relieve him of the charge of negligence if injured while pursuing that method. Custom or usage does not excuse negligence, nor relieve a servant from the duty of exercising reasonable care. *Va. Portland Cement Co. v. Seal*, 484.

23. *Switch Stand—"Standard" Switch Stand—Inspections—Harmless Error.*

In an action to recover for a personal injury inflicted by coming in contact with a switch stand, where a witness testified that the stand was made by a designated man-

ufacturer with their "standard" length rods, and was such as was used by the defendant and other railroad companies, an instruction which spoke of the stand as a "standard" switch stand was not prejudicial to the plaintiff. *Southern R. Co. v. Lewis*, 847.

See NEGLIGENCE, 4; PLEADING, 14, 17; RAILROADS, 11, 13, 18; SALES, 4.

## MINES AND MINERALS.

1. *Adverse Possession—Severance of Surface and Underlying Minerals.*—The title to the surface of land and to the underlying minerals may be vested in different persons, but after severance the title to neither can be acquired by adverse possession of the other. *Morison v. American Association*, 91.
2. *Cloud on Title—Iron Ore in Place—Possession—Removal—Irreparable Injury—Removal.*—The rule requiring the fee-simple owner of real estate to be in possession thereof in order to file a bill to remove a cloud on his title, has no application to the owner of iron ore beneath the surface of the ground. Such ore is not susceptible of actual possession, and the fee-simple owner may file a bill to enjoin the removal thereof, and incidentally to remove a cloud on the title. The removal of the ore is destructive of the very essence of the estate, and the resulting injury is irreparable, and in such case an injunction will be granted, notwithstanding a dispute, or even pending litigation as to the title. *Morison v. American Association*, 91.
3. *Nuisance—Independent Acts of Several—Several Liability—Mining Operations.*—If several mining companies, acting independently, cast their refuse into a stream thereby causing injury to a lower riparian owner, each is liable only for the damage done by its acts, and not for the result of the acts of others. *Pulaski Coal Co. v. Gibboney Co.*, 444.

See EQUITY, 2; MASTER AND SERVANT, 1, 18; TAXATION, 5.

MISCONDUCT OF JURORS. See CRIMINAL LAW, 11, 15.

MISREPRESENTATIONS. See INSURANCE, 1, 3; JUDICIAL SALES, 2; PRINCIPAL AND SUBETY, 1, 2; RAILROADS, 11.

## MISTAKE.

1. *Equity—Mistake—Evidence Required—Negligence.*—Equity will not relieve against a mistake unless the mistake is established by the clearest and most satisfactory evidence. It is not suf-

ficient to show a possibility or even a probability of a mistake. Furthermore, the party complaining must have exercised reasonable diligence in discovering the mistake. If he had within his reach the means of ascertaining the true state of facts, and, without being induced by the other party, neglected to avail himself of his opportunities of information, relief will not be granted. *Solenberger v. Strickler*, 273.

See DEEDS, 1, 2; EVIDENCE, 16; JUDICIAL SALES, 1, 2; REFORMATION OF INSTRUMENTS, 1; SPECIFIC PERFORMANCE, 2; VENDOR AND PURCHASER, 4.

MOOT QUESTIONS. See INJUNCTIONS, 2.

"MORE OR LESS." See VENDOR AND PURCHASER, 6.

MOTIVE. See CRIMINAL LAW, 9, 12, 13.

MULTIFARIOUSNESS. See EQUITY, 4.

#### MUNICIPAL CORPORATIONS.

1. *City of Roanoke—Ordinances—Construction—Costs of Connecting City Property With Water Mains.*—The ordinances of the city of Roanoke touching free water to be furnished by the plaintiff in error, when read together, clearly show that in every case contemplated by the ordinances the water was to be furnished free of charge by the plaintiff in error, but the city was to pay the necessary costs incident to making connections with the mains of plaintiff in error. When the plaintiff in error had laid its mains along the streets of the city where it could connect and use the water free of charge, its obligation to the city was discharged. *Vinton Water Co. v. Roanoke*, 661.
2. *Defective Sidewalks—Negligence of Pedestrian.*—Municipal corporations, while not insurers of the safety of their streets and sidewalks, must exercise reasonable care to keep them in a safe condition for travel in the ordinary modes, and are liable in damages for their failure so to do to one, who while traveling and exercising ordinary care, is injured by reason of their negligence. But to render the municipality liable the plaintiff should have been using reasonable or ordinary care to avoid the accident. *Bedford City v. Sitwell*, 296.
3. *Delegation of Power to Committee—Building Lines—Case at Bar.* A city ordinance providing "That whenever the owners of two-thirds of the property abutting on any street shall, in writing, request the committee on streets to establish a building line on the side of the square on which their property fronts, the

said committee shall establish such line so that the same shall not be less than five nor more than thirty feet from the street line," leaving to the determination of the committee only, within the prescribed limits, how far the building line shall be from the line of the street, is not a delegation to the committee on streets of the functions of the city council to establish building lines. The committee is clothed with no discretion as to whether a building line shall or shall not be established in a given case. *Eubank v. Richmond*, 749.

4. *Franchises—Release from Liability—Publication—Code, Section 1033-f, cl. 5.*—Under the provisions of section 1033-f, cl. 5 of the Code (1904) declaring that no amendment to a city ordinance granting a franchise shall be made which releases the grantee, or his assignee, from the performance of any duty required by the ordinance granting the franchise, unless notice thereof be given to the public by advertising the same for ten days in a newspaper published in the city, the council of the city have no right, without such advertisement, to enter into a contract with a street railway company upon which there is a continuing obligation to do street paving, to accept from it a designated sum of money "in full satisfaction and discharge of all obligation and liability of the company for street paving under its franchises." *McKennie v. Charlottesville R. Co.*, 70.
5. *Ordinances—Construction — Doubts — Practical Construction.*—Where there is doubt as to the proper construction to be placed upon one clause of an ordinance of a municipality, resort should be had to the whole ordinance, and especially to other clauses of the same section, dealing with the same subject matter, in order to ascertain the meaning of the parties in respect to the subject under consideration. Proper consideration should also be paid to the practical construction put upon the instrument by the parties interested since it has been in operation. *Vinton Water Co. v. Roanoke*, 661.
6. *Ordinances—Construction—Free Water—Public Buildings.*—Fish sheds, in existence when a city ordinance was adopted, but not mentioned therein, and which were not connected with the markethouse, and were no part thereof, and were not occupied by the city, but leased to individuals, are not embraced within an ordinance requiring a water company to furnish free water to the public markethouse, courthouse, jail, and other public buildings. *Vinton Water Co. v. Roanoke*, 661.
7. *Ordinances—Publication—Notice—Waiver.*—One who has had and availed himself of every privilege and advantage that he could have enjoyed if a city ordinance had been published in the manner required by the city charter cannot complain of the want or insufficiency of such publication, as he has not been prejudiced thereby. The object of the publication is to



give notice, and this the party has had. *Bradley v. Richmond*, 521.

8. *Power to Compromise Disputed Claims—Arbitration—Consideration.*—A municipal corporation has the right, as a necessary incident to its right to contract and to sue and be sued, to settle and adjust unascertained or disputed claims made against it, or made by it against others. It may also submit such claims to arbitration, and the award, when fairly made, is binding on the corporation. In either case the controversy over the claim furnishes all the consideration necessary. *McKennie v. Charlottesville R. Co.*, 70.
9. *Sidewalks—Safe Condition—Presumption—Knowledge of Defects—Case at Bar.*—A person using a street or sidewalk in the ordinary manner has the right, in the absence of knowledge to the contrary, to assume that the street or sidewalk is in a reasonably safe condition, and is not, as a matter of law, required to be on the lookout for defects or obstructions, but where he has knowledge of the defective condition of the streets or sidewalks, and especially when he is not using them in the manner in which they are ordinarily used, or intended to be used, he cannot of course assume that they are in an ordinarily good condition, and act upon that assumption. In the case at bar the plaintiff knew of the defective condition of the sidewalks generally, though not specially at the place of accident, and did not use reasonable care and diligence for her own protection in the use made of the sidewalk, and hence cannot recover. *Bedford City v. Sitwell*, 296.

See ARBITRATION AND AWARD, 1; CONSTITUTIONAL LAW, 4, 8; LICENSES, 2, 3, 4, 5; TAXATION, 3.

MURDER. See CRIMINAL LAW, 2, 5, 7, 8, 9, 11, 12, 13, 17.

#### NAVIGABLE WATERS.

1. *Logs and Logging—Floatable Stream—Case at Bar.*—In order to constitute a stream a public highway it must be of such a character as that it can be substantially useful to the public in transporting the products of the field and forest. A stream that is so narrow and rapid, and rises and falls so suddenly and unexpectedly that it cannot be made of substantial, practical use for floating logs is not a floatable stream, and, if the facts stated in the declaration in the case at bar be proved, then the stream mentioned therein is not a public highway, and the demurrer to the declaration was properly overruled. *Hot Springs L. Co. v. Revercomb*, 240.
2. *Riparian Owners—Consent to Buildings for Particular Purpose—Use for Other Purposes.*—The consent of a riparian owner who

has let a part of his land for the purposes of erecting a wharf thereon for the lessee to erect houses between low water mark and the line of navigability, for the purpose of "barreling oysters," does not authorize the use of said houses for carrying on a mercantile business, nor does the assignment of said land to the lessee by the State for oyster planting purposes confer upon him any such right. *Grinels v. Daniel*, 874.

3. *Riparian Owners—Land Between Low Water and Line of Navigability—Title.*—The title to the land between low water mark and the line of navigability of the public waters of this State is in the Commonwealth, but the riparian owner has a qualified right in the same land which is property and is valuable, and of which he cannot be deprived except in accordance with established law, and, if for a public use, upon due compensation. *Grinels v. Daniel*, 874.

4. *Riparian Owners—Lease of Land for Wharfs—Use for Other Purposes.*—The lease of a parcel of land on the beach of a navigable river for the purpose of erecting thereon a steamboat wharf does not deprive the lessor of his riparian rights to any greater extent than is necessary to enable the lessee to erect the wharf and use it for the purposes for which it was built. Neither the lessee nor any person claiming under him has any right to erect, or to authorize any other person to erect, on the leased premises, or between low water mark and the line of navigability of said river, houses for carrying on, or to carry on, any business not connected with that of conducting the wharf. *Grinels v. Daniel*, 874.

See WITNESSES, 6.

## NEGLIGENCE.

1. *Automobiles — Fright of Horse — Emergency — Negligence of Plaintiff.*—It is reasonable to presume that the fright of a horse will be increased by stopping an automobile just opposite to him, rather than by passing on by; and if the driver of the machine passes on he is not responsible for the damages inflicted by the horse where the emergency in which he was placed was occasioned by the imprudence of the plaintiff in undertaking to hitch the horse, which was "automobile shy," to a buckboard, in a crowded street, when there were other suitable places to hitch him in the immediate vicinity. *Baughner v. Harman*, 316.

2. *Automobiles—Fright of Horse—Negligence.*—The owner of an automobile who is running his machine in a careful manner, at a slow rate of speed, along a city street thronged with travelers and vehicles, and keeping a lookout to avoid accidents, is not liable for an injury inflicted by a horse taking fright

thereat, when he was not aware of any danger from said fright until his machine had reached a point opposite to or had passed the horse's head, and then deemed it less dangerous to pass on than to stop, and when the horse was in charge of three able-bodied men, and there was nothing in its behavior to lead him to suppose that it would become unmanageable. *Baughner v. Harman*, 316.

3. *Burden of Proof—Degree of Evidence—Verdict.*—The burden of proving actionable negligence is primarily upon the plaintiff, who must establish it by affirmative evidence showing more than a mere probability of a negligent act. Its existence cannot be left entirely to conjecture, and the tentative conclusions of juries based upon no sure grounds of inference cannot be upheld. This doctrine is not in conflict with the rule that the verdict of a jury on a question of negligence ought not to be disturbed where the evidence is such that reasonable men may fairly differ as to whether or not there was such negligence. *Baughner v. Harman*, 316.
4. *Contributory Negligence—Ignorance of Danger.*—A plaintiff cannot recover if he is guilty of negligence proximately contributing to the injury of which he complains, although the danger to which he was exposed was not so plain and clear that he was necessarily at fault in not apprehending it. Negligence may be independent of danger. *Ches. & O. R. Co. v. Ghee*, 527.
5. *Independent Acts of Several—Apportionment of Damages—Joint Tort Feasors.*—Where there is neither community of interest, concert of action, common purpose or design, nor joint, concurrent negligence, but several concurring negligent causes, the effects of which are separable, due to independent authors, neither being sufficient to produce the entire loss, each of the several parties concerned is liable only for the injuries due to his negligence; and the fact that it is difficult to measure accurately the damage caused by each contributor to the aggregate result does not affect the rule, or make any one liable for the acts of others. In such case there is no joint wrong, and hence there can be no joint action, nor in a single action can all the damages be assessed upon one tort feasor. *Pulaski Coal Co. v. Gibboney Co.*, 444.
6. *Pleading—Contributory Negligence—Matter of Defense—Negligence Per Se—Case at Bar.*—Contributory negligence is a matter of defense which the plaintiff need not negative either by his pleadings or proofs, but which the defendant must establish by a preponderance of the evidence, unless it appears from the plaintiff's own evidence. It is not to be reasonably inferred that a brakeman was guilty of negligence *per se* from the mere fact that his foot, ankle and leg were caught and crushed be-

tween cars while he was engaged in coupling them. *Interstate R. Co. v. Tyree*, 38.

7. *Pleading—Declaration—Allegation of Negligence—Contributory Negligence—Case at Bar.*—A declaration, after alleging that the plaintiff purchased of the defendant fifty feet of fuse which the defendant warranted to be suitable for the use for which it was intended, averred that the plaintiff undertook to use the fuse in making a blast, and that when the fuse was first lighted in the ordinary way, and according to approved methods, it failed to fuse and smoke in the ordinary way; that supposing that the fuse had not taken fire, he undertook to light it a second time; that it again failed to show any sign of being lighted, as it should have done, and appeared to go out; whereupon the plaintiff supposing that the fuse had not taken fire, frazzled the end in the ordinary and customary way, and again applied the blaze, and again the fuse failed to respond; whereupon he again frazzled the end and applied the blaze the fourth time, and immediately upon the application of the blaze the explosion took place causing the injury of which the plaintiff complains. There was a demurrer to the declaration.

*Held:* The conduct of the plaintiff in remaining by the fuse after he had applied fire to it precludes a recovery, and the demurrer to the declaration was, therefore, rightly sustained. *Cody v. Norton Coal Co.*, 363.

8. *Probabilities.*—If it is just as probable that an injury inflicted on a plaintiff was purely accidental as that it was inflicted through the negligence of the defendant, the verdict should be for the defendant. *Atlantic Coast Line v. Caple*, 514.

9. *Proximate Cause—Requisites.*—The requisites of proximate cause are the doing or omitting to do an act which a person of ordinary prudence could foresee might naturally and probably produce the injury by such act or omission, and the infliction of the injury by such act or omission. *Jacoby Co. v. Williams*, 55.

10. *Railroads—Negligence—Discovered Peril.*—The doctrine of discovered peril is a qualification of the general rule that the contributory negligence of the person injured ordinarily bars a recovery. The exception involves the principle that, although the plaintiff has been guilty of negligence in exposing himself to peril, he may nevertheless recover if the defendant, after knowing of his danger, could have avoided the injury by the exercise of ordinary care, and failed to do so. *Ches. & O. R. Co. v. Corbin*, 700.

11. *Railroads—Negligence—Proximate and Remote Cause.*—Where the negligence of the defendant is the proximate cause of an injury, and that of the plaintiff only the remote cause, the

plaintiff may recover, notwithstanding his negligence, as the law regards the immediate and proximate cause which directly produces the injury, and not the remote cause which may have antecedently contributed to it. *Southern R. Co. v. Bailey*, 833.

12. *Risk to Save Life—Imminent Peril—Negligence of Defendant.*

The right of one person voluntarily to risk his life or safety to rescue another from imminent danger caused by the negligence of another involves two propositions—first, the party to be rescued must be in imminent danger; and, second, that peril must have been caused by the negligence of that other. Furthermore, to hold that other liable, the person to be rescued must have been, at the time of the attempted rescue, in a place of imminent danger caused by the negligence of the defendant, in order to excuse the contributory negligence of the rescuer. *Wright v. Atlantic Coast Line*, 670.

See CARRIERS, 4, 6, 7; DEATH BY WRONGFUL ACT, 1; ELECTRICITY, 1, 2; INSTRUCTIONS, 4, 9, 10; MASTER AND SERVANT, 4, 5, 8, 10, 12, 15, 16, 19, 20; MUNICIPAL CORPORATIONS, 1, 2; NUISANCE, 2, 3, 4; PLEADING, 2, 4, 11, 14, 18, 19; RAILROADS, 2, 4, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 20, 21, 22, 23, 24, 26, 27; STREET RAILWAYS, 3, 4, 5, 6; TRESPASS, 3.

## NEW TRIAL.

1. *Conflicting Evidence—Verdict Conclusive.*—Where the evidence on a material question in a case is conflicting, the verdict of the jury is conclusive on the court on a motion for a new trial. *Ches. & O. R. Co. v. Christian*, 723.
2. *Verdict Contrary to Evidence—Conflicting Evidence—Province of Jury.*—It is the province of the jury to pass on the credibility of witnesses and the weight to be given to their testimony. If there are conflicts or discrepancies in the evidence it is the jury's duty to reconcile them if possible, and if not, they may credit the witness or witnesses who in their opinion are best entitled to it. If there is evidence sufficient to support the verdict, it will not, as a rule, be set aside. *Southern R. Co. v. Cash*, 282.
3. *Conflicting Evidence—Discrepancies.*—The verdict of a jury will not be set aside if there is evidence sufficient to sustain it, although there may be conflicts and discrepancies in the oral testimony of the prevailing party. It is the province of the jury to reconcile these, if possible, and if not to give credence to the witness or witnesses who, in their judgment, are best entitled to it. *Ches. & O. R. Co. v. Christian*, 723.
4. *Verdicts—Set Aside by Court of Its Own Motion.*—It is entirely competent for the court, of its own motion, in a proper case, to

set aside the verdict of a jury. *Ivanhoe Furnace Corp. v. Crowder*, 387.

See APPEAL AND ERROR, 24; CRIMINAL LAW, 3, 11, 14, 15.

NON-RESIDENTS. See ATTACHMENTS, 1; TAXATION, 2, 10.

NOTICE. See ESTOPPEL, 1; INSURANCE, 2; MUNICIPAL CORPORATIONS, 4, 8; RAILROADS, 27; REGISTRY, 1; SALES, 2.

NOTICE FOR JUDGMENT. See PLEADING, 20, 21.

NOVATION. See CONTRACTS, 9.

## NUISANCE.

### 1. *Continuous and Permanent Injuries—Recurrent Injuries.*—

Where the damages resulting from an act lawful in itself are of such a nature that they are continuous and permanent, then all the damages from such nuisance must be recovered at one time and in one action, but when they are of such nature that it cannot be told whether or not they will continue, or what damage will result in the future, though the act which causes the damage is continuing and permanent, successive actions must be brought for the subsequent damage. *Virginian R. Co. v. Jeffries*, 471.

### 2. *Damages—Damnum Absque Injuria.*—A loss resulting from a lawful act done without negligence is *damnum absque injuria*, but a nuisance is unlawful, and, however carefully maintained, the party maintaining it is liable for the resulting injury to others. *Terrell v. Ches. & O. R. Co.*, 340.

### 3. *Injury to Property—Negligence.*—If, in an action to recover damages for a private nuisance, the plaintiff proves the existence of the nuisance causing injury to his property, it is immaterial whether the nuisance was created or operated negligently or not. *Ches. & O. R. Co. v. Greaver*, 350.

### 4. *Legislative Authority.*—The fact that a person or corporation has authority from the legislature or a municipality to do certain acts does not give the right to do such acts in a way constituting an unnecessary nuisance. *Terrell v. Ches. & O. R. Co.*, 340.

### 5. *Recurrent Injuries—Case at Bar.*—If an embankment of a railroad built partially into the bed of a river injures a sand bank on the opposite shore only at times of high water, then the erection of the embankment is not the direct cause of the injury, and no action lies in favor of the owner of the sand bank until some actual injury is suffered by him in conse-

quence of the action of the water in the river. *Virginian R. Co. v. Jeffries*, 471.

6. *Right of Action—Purchaser in Possession—Acts of Wrongdoer—Possession as Title.*—A purchaser of land in possession may maintain an action to recover damages for a nuisance committed thereon, although his contract of purchase is not enforceable in a court of equity. Such infirmity cannot be taken advantage of by a wrongdoer who was not a party to the contract nor concerned in its validity. Furthermore, possession alone is sufficient title in such case to maintain the action. *Virginian R. Co. v. Jeffries*, 471.

See MINES AND MINERALS, 2; RAILROADS, 14, 15, 16; WITNESSES, 8.

NUNC PRO TUNC ORDERS. See BILLS OF EXCEPTION, 1.

OFFICE JUDGMENTS. See JUDGMENTS, 2, 3.

OFFICERS. See COUNTIES, 1.

OPINION EVIDENCE. See EVIDENCE, 18; WITNESSES, 6, 7, 10.

#### OYSTER LANDS.

1. *Transfer—Writing Without Seal.*—A valid and binding writing, not under seal, transferring to the grantee in such writing oyster grounds leased by the grantor from the Commonwealth is sufficient as between the parties for that purpose. *Johnson v. Michaux*, 595.

OYSTERS. See NAVIGABLE WATERS, 2.

PAROL EVIDENCE. See BILLS OF EXCEPTION, 2, 3; EVIDENCE.

PARTIES. See JUDICIAL SALES, 3; PARTITION, 2; STATE CORPORATION COMMISSION, 1.

#### PARTITION.

1. *How Made—Allotment of Part and Sale of Residue.*—The whole subject of the partition of real estate is regulated by statute in this State. Under the provision of the statute allowing "allotment of part and sale of the residue," the part allotted must (in the absence of consent of parties) be divided in equal portions, as near as may be, among all those entitled to share in it, and the residue be sold and the proceeds divided according to the respective rights of the parties. It is not permissible to allot in kind to some, and sell the shares of others for the purpose of distribution. *Jackson v. Jackson*, 393.

2. *Parties—Legal Title in Plaintiff—Equitable Interests of Defendants.*—A party holding the legal title to the whole of a tract of land, in an undivided two-thirds of which others own the complete equitable estate, with the right to call for the legal title, may, under the liberal provisions of section 2565 of the Code, file a bill against such others for a partition of the whole. *Hagan v. Taylor*, 9.

See SPECIFIC PERFORMANCE, 3.

## PARTNERSHIP.

1. *Accounting—Burden of Proof.*—In a suit to settle the affairs of a partnership the burden of proof is upon the managing partner, who kept the books of the firm. *Lewelling v. Lewelling*, 761.
2. *Accounting—Lack of Evidence—Speculative Results—Refusal of Equity to Take Jurisdiction.*—Where partners have kept no books or accounts of their partnership transactions, and any conclusion which a court of equity might reach in its efforts to settle the accounts between the partners would be purely speculative and conjectural, the court will withhold its hand and leave the parties to stand where they have placed themselves. Any other rule would open the door for fraud on the part of a surviving partner upon the estate of his deceased partner, and this is especially true where the surviving partner had practically exclusive control of the affairs and dealings of the partnership, and was solely responsible for the lack of any books or accounts showing the status of the accounts between the partners. *Lewelling v. Lewelling*, 761.
3. *Advance to Member by Firm—Action at Law Not Maintainable.* Prior to the settlement of the partnership affairs an action of law will not lie upon a note given by one member of the firm to the firm for an advance made to him by the firm, though he subsequently sold his interest in the firm to another partner, and the firm was thereafter dissolved, and the note held by the assignee, in liquidation, of the other members of the firm, and the action brought by the assignee in his own name. The debt is not an individual debt due by the partner to the firm, but is a mere item in the partnership account. *Summerson v. Donovan*, 657.
4. *Diversion of Funds—Lien on Investment.*—Where partnership funds have been used by one partner, without authority, to purchase and improve land conveyed to his wife, the land so purchased will be charged with a lien in favor of the partnership to the extent that the partnership funds have been so used and unaccounted for. *Brown v. Orr*, 1.



5. *Purchase of Judgment of One Partner Against Another.*—Where parties are partners in but a single transaction, the purchase by one partner with his own means of a judgment against another partner which is in nowise connected with his partnership affairs, at a time when no funds have arisen out of which the latter is entitled to claim profits, is outside the scope of the partnership business, and is not forbidden by law. *Miller, T. W., v. Ferguson*, 217.
6. *Trust Relation—Adverse Interest.*—A relation of trust and confidence exists between partners in respect to their dealings with matters pertaining to the partnership. Hence one partner will not be allowed to make a profit on his copartners by the purchase of property of the firm, or of a claim against it. *Miller, T. W. v. Ferguson*, 217.

See RES JUDICATA, 1, 2.

PASS. See CARRIERS, 5.

PASSENGERS. See CARRIERS, 4, 6, 7; PLEADING, 11.

PENALTIES. See DAMAGES, 8, 9.

#### PERJURY.

1. *Witnesses—Disqualification—Perjury—Conviction in Federal Court—Testimony in State Court.*—A witness convicted of perjury in a United States court sitting in this State is not thereby disqualified from testifying in one of the courts of this State. The Federal statute expressly limits the disqualification to “giving testimony in any court of the United States,” and the Virginia statute intended only to disqualify persons convicted of perjury in a court of this State. Neither the Federal statute nor the State statute intended to impose, or could impose, the punishment prescribed by the other. *Samuel’s Case*, 901.

PERPETUITIES. See WILLS, 2.

#### PLEADING.

1. *Allegation and Proof—Evidence.*—The proof in a cause must correspond with the allegations of the pleadings. A plaintiff cannot allege one set of facts in his declaration, and recover upon proof of an entirely different set of facts. *Atlantic Coast Line v. Caple*, 509.
2. *Allegation of Main Facts of Negligence—Proof of Subordinate Facts.*—Where the primary or main facts constituting the negligence complained of have been sufficiently alleged in the

- declaration, all merely subordinate and consequential facts that can be reasonably implied by its averments are admissible in evidence to sustain the principal facts, although not stated in the declaration. *Interstate R. Co. v. Tyree*, 38.
3. *Arrest of Judgment—When it Lies—Case at Bar—Master and Servant.*—A motion in arrest of judgment lies only for error apparent on the face of the record. If a declaration against master and servant for the negligent killing of plaintiff's intestate charges negligence on the part of both defendants, and there is a verdict against the master only, and it appears solely from the evidence certified that the servant alone was negligent, this is not error apparent on the face of record, and hence a motion in arrest of judgment on this ground should be overruled. *Ivanhoe Furnace Corp. v. Crowder*, 387.
4. *Contributory Negligence of Plaintiff.*—In an action to recover for personal injuries, it is not necessary in this State for the plaintiff to negative his own contributory negligence in his declaration. *Danville v. Thornton*, 541.
5. *Declaration—Contingent Liability—Necessary Averments.*—In an action on a contract to pay money when certain designated lots are sold and the purchase money therefor realized, it is necessary to allege in the declaration and to prove not only that the lots have been sold and conveyed, but when the sale and conveyance was made, and that the purchase money therefor has been realized, and when. *Nottingham v. Ackiss*, 810.
6. *Declaration Good in Part—Presumption as to Proof.*—Where a declaration is good as to a part of the cause of action therein stated, the presumption is that the trial court confined the proof upon it within proper bounds. *Hot Springs L. Co. v. Revercomb*, 240.
7. *Declaration—Sufficiency.*—A declaration is sufficient which sets out with fullness and clearness every essential fact necessary to apprise the defendant of the nature of the demand against him, and to enable the court to say, upon demurrer, whether, if the facts stated are proved, the plaintiff is entitled to recover. *Cook Mining Co. v. Thompson*, 369.
8. *Declaration—Sufficiency.*—A declaration is good which states sufficient facts to enable the court to say, upon demurrer, whether, if the facts stated were proved, the plaintiff would be entitled to recover. *Ches. & O. R. Co. v. Melton*, 728.
9. *Declaration—Sufficiency—Bill of Particulars.*—If a declaration in tort does not plainly describe "the sickness or disorder" alleged to result from a physical injury charged, the defendant may require the needed particularity by calling for a bill of particulars under section 3249 of the Code. *Norfolk & W. R. Co. v. Spears*, 110.

10. *Declaration—Sufficiency—Demurrer—Bill of Particulars.*—If a declaration states a good cause of action (as it does in the case at bar) and the defendant desires a more particular statement of the grounds of complaint, his remedy is not by a demurrer to the declaration, but by a motion for a bill of particulars under section 3249 of the Code. *Interstate R. Co. v. Tyree*, 38.
11. *Declaration—Sufficiency—Injury to Passenger—Collision of Cars.*—In an action for damages by a passenger for hire on a “roller coaster” car operated by an amusement company, a declaration which alleges that the plaintiff was injured by a collision between two of these cars, both of which were operated and controlled by the defendant, and that this collision and the consequent injury was the result of negligence on its part, sufficiently informs the defendant of the case which it will be required to meet, and is good on demurrer. It is unnecessary to describe the construction and operation of the “roller coaster.” *Washington Park Co. v. Goodrich*, 692.
12. *Declaration—Sufficiency—Sickness and Disorder—Nervous Disorder.*—A declaration which adequately charges a physical injury to the plaintiff, and further avers that by reason of the physical injury the plaintiff became sick, sore and disordered, which condition continued “hitherto,” sufficiently warns the defendant to expect evidence of any sickness or disorder, the origin or aggravation of which could be traced to the act or wrong complained of, and it need not be more specifically described. Under such allegation serious nervous disorders may be shown. *Norfolk & W. R. Co. v. Spears*, 110.
13. *Grounds of Defense—Amendment—Accident—Mistake.*—A motion to amend the statement of grounds of defense is addressed to the sound discretion of the court and should generally be allowed where any element of accident, surprise or mistake renders it advisable to amend a pleading at trial, but it is properly refused where the new matter sought to be introduced has been known to the parties from the beginning of the action, and they simply neglected to insert it. Defenses not embraced in the statement, nor otherwise set out in the pleadings, cannot be made. *Hurricane Lumber Co. v. Lowe*, 380.
14. *Joint Action of Tort—Dismissal as to One Defendant—Master and Servant—Case at Bar.*—In a joint action of tort against master and servant, after a verdict against the master and in favor of the servant has been set aside, although the evidence disclosed no negligence on the part of the master except that imputed on account of the negligence of the servant, it is entirely competent for the plaintiff to dismiss the action as to

- the servant, as he might in the first instance have sued either or both of them. *Ivanhoe Furnace Corp. v. Crowder*, 387.
15. *Joint Action of Tort—Verdict Against One Defendant—Silence as to Another.*—In a joint action of tort against master and servant, a verdict against the master, making no mention of the servant, is equivalent to a verdict in favor of the servant. *Ivanhoe Furnace Corp. v. Crowder*, 387.
16. *Joint Tort—Dismissal as to One Defendant—Effect.*—If, in an action of tort against two defendants, a verdict in favor of one and against the other be set aside, and subsequently the action be dismissed as to one of the defendants, the case against the other defendant stands upon the record as though he alone had been sued. *Ivanhoe Furnace Corp. v. Crowder*, 387.
17. *Pleading—Judgment Non Obstante—When Given—Case at Bar—Master and Servant.*—A motion for a judgment *non obstante* is made in cases where, after a pleading by the adversary in confession and avoidance, and issue joined thereon and verdict for the adversary, the unsuccessful party, on retrospective examination of the record, conceives that such pleading was bad in substance and might have been the subject of demurrer on that ground. It will not be granted on the motion of the master in an action of case against master and servant where the trial is had on the general issue of not guilty, although the verdict is against the master alone, and the evidence shows that the servant only was guilty. *Ivanhoe Furnace Corp. v. Crowder*, 387.
18. *Negligence—How Pleaded—Wilful Injury.*—Negligence is a conclusion of law from facts sufficiently pleaded. It is not sufficient to charge that the plaintiff was wilfully and wantonly injured. The facts relied on to establish the wilful and wanton negligence for which the defendant is to be held liable must be stated with reasonable certainty. *Wright v. Atlantic Coast Line*, 670.
19. *Notice for a Judgment—Action Against Endorser—Allegation of Presentment and Notice—Demurrer—Bill of Particulars.* The notice of a motion for a judgment under section 3211 of the Code against the endorser of a negotiable note must contain such allegations of presentment for payment and notice of dishonor to the endorser as will fix a liability upon him for the payment of the note, else the notice will be bad upon demurrer. The defendant is not obliged to call for a bill of particulars in such case. *Security Loan Co. v. Fields*, 827.
20. *Notice for a Judgment—Must State a Case—Demurrer—Code, Section 3211.*—In a proceeding by motion for a judgment under section 3211 of the Code the notice takes the place of the writ and the declaration in a regular action, and, while

the notice is viewed with great indulgence by the courts, it must set out matter sufficient to maintain the action; and whether or not it does this is tested by a demurrer to the notice. *Security Loan Co. v. Fields*, 827.

21. *Object of Declaration—How Negligence Should be Averred.* The office of a declaration is to inform the defendant of the case he has to meet, so that he may have a reasonable opportunity to prepare his defense. The evidence to sustain the case stated, of course, need not be pleaded, but it is not enough to say that the plaintiff was injured as the result of the defendant's careless and negligent conduct. The facts relied on to establish the defendant's negligence must be stated with reasonable certainty. It is not sufficient to aver negligence generally, but the declaration must aver the act of negligence, and show that it is the efficient and proximate cause of the injury complained of. *Ches. & O. R. Co. v. Melton*, 728.
22. *Pleas Amounting to General Issue—Refusal to Reject.*—Pleas which amount to the general issue should, upon request, be rejected, though the failure to do so does not of itself constitute reversible error. *Norfolk & W. R. Co. v. Mundy*, 422.
23. *Recoupment at Common Law and Under Section 3299 of Code.* When the demands of both parties spring out of the same simple contract, the defendant may assert a claim for unliquidated damages under his common law right of recoupment, or under section 3299 of the Code, which does not impair his common law right, but, in addition thereto, permits the defendant to recover any legal damages he can prove in excess of the damages claimed by the plaintiff. *Leterman v. Charlottesville L. Co.*, 769.

See APPEAL AND ERROR, 22; ASSUMPSIT, 1, 2; DAMAGES, 6; DEBT, 1; DEMURRER TO EVIDENCE, 2, 3, 4; MASTER AND SERVANT, 12; NEGLIGENCE, 6, 7; NUISANCE, 3; RAILROADS, 14; RES JUDICATA, 2; TRESPASS, 3; TROVER, 1.

PLEA IN ABATEMENT. See RES JUDICATA, 2.

#### POWERS.

1. *Powers Given to Several—Majority to Act—Common Law Rule—Statutes.*—At common law, where several persons are authorized to do any act of a public nature they must all deliberate, though a majority may decide, and the common law is not to be considered as altered or changed by statute unless the legislative intent is plainly manifested. *Norfolk & W. R. Co. v. Virginian R. Co.*, 631.

See MUNICIPAL CORPORATIONS, 3.

**PRESUMPTIONS.** See **MASTER AND SERVANT**, 3, 5, 7; **PLEADING**, 6; **VENDOR AND PURCHASER**, 7.

**PRINCIPAL AND AGENT.**

1. *Personal Liability of Agent—Rights of Third Persons.*—An agent may become liable on a contract contrary to his actual intention, but if he contracts in such form or under such circumstances as to make himself personally liable, he cannot afterwards, whether his principal was or was not known at the time of the contract, relieve himself of that responsibility. *Leterman v. Charlottesville L. Co.*, 769.
2. *Undisclosed Principal—Action Against Agent—Defense Under Section 3299 of Code.*—If an agent of an undisclosed principal is sued by the other party to the contract for the price of work done, the agent may, under section 3299 of the Code, set up the damages resulting from the failure of the plaintiff to do the work, and get the benefit of such damages as fully as if he had instituted an independent action to recover them. *Leterman v. Charlottesville L. Co.*, 769.
3. *Undisclosed Principal—Action Against Agent—Defense Under Section 3299 of Code—Beneficial Interest of Principal.*—An agent of an undisclosed principal when sued upon the contract by the other party thereto may, under section 3299 of the Code, set up as a defense any matter which would entitle him either to recover damages at law from the plaintiff or the person under whom the plaintiff claims, or relief in equity, in whole or in part, against the obligation of the contract sued on. He is entitled to the same relief as could be obtained in an independent action brought for the same cause. He is deemed to have brought an action at the time of filing the plea. If the agent defends under section 3299 of the Code, it is no ground of objection to the plea that the beneficial interest in the recovery, if any, is in another, or that the agent will have to account to another. *Leterman v. Charlottesville L. Co.*, 769.
4. *Undisclosed Principal—Rights and Liabilities of Agent and Other Party.*—When a non-negotiable simple contract is entered into between an agent of an undisclosed principal and a third person, the latter may, as a general rule, hold either the agent or his principal, when discovered, personally liable on the contract, but he cannot hold both. So, likewise, either the agent or his principal may sue upon such a contract; the defendant, when the principal sues upon it, being entitled to be placed in the same situation at the time of the disclosure of the real principal, as if the agent had been the contracting party. If the agent is sued the plaintiff recovers such damages as have resulted from the breach of the contract by him. If the agent sues, he is entitled to recover (unless his principal

interferes in the suit) the full measure of damages in the same manner as though the action had been brought by the principal. *Leterman v. Charlottesville L. Co.*, 769.

See ATTORNEY AND CLIENT, 1; INSURANCE, 14.

#### PRINCIPAL AND SURETY.

1. *False Representations to Surety by Creditor.*—If the creditor undertakes to describe to a surety the terms of a loan to his principal, and his representations are material and false, the surety cannot be held liable unless he had notice of the character of the loan; and whether or not he had such notice is a question for the jury. *Atl. Trust Co. v. Union Trust Corp.*, 286.
2. *Misrepresentations to Surety—Knowledge of Creditor.*—A person proposing to become surety for the conduct or contracts of another has the right to be treated with perfect good faith. The law does not as a rule, however, require that the party taking the surety shall seek him out and explain to him the nature and extent of the obligation, nor does it hold him responsible for fraudulent representations made to the surety by the principal, or by a third party without his knowledge or consent. But where, with the knowledge or consent of the creditor, there is a misrepresentation to the surety with regard to any material fact which, if he had known, he might not have entered into the undertaking of suretyship, it will thereby be rendered invalid, and the surety discharged from his liabilities. If the contract between the creditor and the principal debtor is less advantageous to the principal than is set forth in the written contract by which the principal and surety become bound to the creditor, and this fact is known to the creditor, but is unknown to the surety, the latter is not bound. *Atl. Trust Co. v. Union Trust Corp.*, 286.
3. *Subsequent Agreement Between Creditor and Principal—Discharge of Surety.*—After a loan has been negotiated, and the debtor and his surety have given their obligation to the creditor, a subsequent agreement between the creditor and the principal debtor entered into for their own convenience, but without consideration, that the sum loaned shall only be gotten from the creditor as the debtor needs it for a special purpose, is no such binding legal contract, changing the character of the surety's undertaking, as will relieve him from liability on his obligation. The agreement is without consideration, and the principal may demand and receive the money loaned at once. *Atl. Trust Co. v. Union Trust Corp.*, 286.

PRIVILEGE. See WITNESSES, 11.

PROXIMATE CAUSE. See NEGLIGENCE, 9.

PUBLICATION. See MUNICIPAL CORPORATIONS, 8.

PURCHASER. See VENDOR AND PURCHASER.

QUIETING TITLE. See MINES AND MINERALS, 3.

## RAILROADS.

1. *Exclusive Privileges—Ultra Vires Acts—Advertising.*—In the absence of charter power, express or implied, or of power conferred by general law, a railroad company chartered and doing business as a common carrier of passengers and freight cannot grant to any one the exclusive privilege of placing advertisements on its box cars. A contract for such privilege is *ultra vires* and void, and, if still executory, will not be enforced, nor will damages be given for its breach. *National Car Co. v. L. & N. R. Co.*, 413.
2. *Fires—Dry Seasons—Greater Care.*—In an unusually dry season, when all inflammable material is very dry and liable to be set on fire by the smallest spark, and a wind is blowing from an engine toward wooden buildings or combustible material, greater care and caution are required of a railroad company in the operation of its trains than when these conditions do not exist. *Norfolk & W. R. Co. v. Thomas*, 622.
3. *Fires—Excessive Speed of Trains—Evidence—Time-Tables Dated Five Years After Fire.*—In an action against a railroad company to recover for a loss occasioned by a fire set out by its engine in the year 1903, which was running at the rate of thirty-eight miles an hour, one of its time-tables for the year 1908, showing the maximum rate of speed of such trains to be thirty miles an hour, may be offered in evidence by the plaintiff as tending to show that the rate of thirty-eight miles an hour in 1903 was unreasonable and excessive, in the absence of evidence showing any change in the roadbed or traffic of the defendant since 1903, and when the time-table of 1903 was inaccessible to the plaintiff. If the rules regulating the speed of trains in 1903 were in existence, they were in the possession of the defendant company, and could be produced by it. *Norfolk & W. R. Co. v. Thomas*, 622.
4. *Fires—Prima Facie Case for Plaintiff—Burden on Defendant.* Where the evidence shows that a fire which destroyed a house could only have been caused by the passing engines of a railroad company, that there was no fire in the house and no



other way of accounting for it, but the particular engine setting out the fire is not identified, and it may have been set by any one of four engines which passed the house at an opportune time for starting the fire, the railroad company is presumptively charged with negligence, and it has the burden of showing that each of the four engines was properly equipped and operated. *Norfolk & W. R. Co. v. Thomas*, 622.

5. *Fires—Prima Facie Case for Plaintiff—Proof Required of Defendant.*—In an action against a railroad company to recover the value of property destroyed by fire, when the plaintiff has made out a *prima facie* case that the fire was set out by sparks from an engine of the defendant, the burden is on the defendant to show that it had availed itself of all the best mechanical contrivances and inventions in known practical use for arresting sparks. *Norfolk & W. R. Co. v. Thomas*, 622.
6. *Highways—Acceptance—Enforced Use—Railroads—Change of County Road.*—Where a railroad company has been permitted to use a public road for its roadbed upon condition that it construct a new road equally as convenient as the old road, the fact that the public used the new road and that the county authorities, from time to time, worked and repaired it, cannot be construed as an acceptance of the new road in the face of an unequivocal refusal of record by the county court to approve and accept the road as a proper discharge by the railroad company of its obligations. The enforced use of the new road, for which the railroad company is responsible, cannot be invoked as an evidence of its acceptance. *Norfolk & W. R. Co. v. Supervisors*, 95.
7. *Highways—County Roads—Right to Alter—Railroads.*—Under the provisions of section 1094 of the Code of 1887, a railroad company can only alter a public road, or occupy it for its purposes, "whenever it shall have made an equally convenient road in lieu thereof," and its promise to make such new road is only an undertaking to do what the law required it to do before it could take the public road for its purposes. A promise to perform a legal duty does not make it any less a duty, nor does it transform the legal duty into a mere personal obligation. *Norfolk & W. R. Co. v. Supervisors*, 95.
8. *Licensee—Lookout.*—Where the roadbed of a railroad company at a given point is, and, for a long time, has been, used with the knowledge and tacit consent of the company as a passageway for the general public at all hours of the day and night, persons so using the roadbed are licensees and the company owes them the duty of ordinary care to keep a reasonable lookout for them at such point, and to endeavor to avoid injuring them. If in the discharge of that duty the engineer in charge of a train could have discovered a licensee on the track

(under circumstances which would naturally have induced belief in a reasonable mind that he was unconscious of danger) in time to have warned him of his danger or to have stopped the train and avoided injuring him, and failed to do so, the company is liable. *Ches. & O. R. Co. v. Corbin*, 700.

9. *Negligence—“Last Clear Chance”—Concurrent Negligence.*—The doctrine of the “last clear chance” applies, notwithstanding the contributory negligence of a plaintiff, where the defendant knows, or by the exercise of ordinary care ought to know, of plaintiff’s danger, and it is obvious that he cannot extricate himself from it, and fails to do something which it has power to do to avoid the injury; or when the plaintiff is in some position of danger from a threatened contact with some agency under the control of the defendant, when the plaintiff cannot, and the defendant can, prevent the injury. The plaintiff must show that at some time, in view of the entire situation, including his own negligence, the defendant was thereafter culpably negligent and that such negligence was the latest in succession of causes. In such case the plaintiff’s negligence is not the proximate cause of the injury. But this doctrine has no application to a case where both parties are equally guilty of an identical duty, the consequences of which continue on the part of both to the moment of the injury, and proximately contribute thereto. *Southern R. Co. v. Bailey*, 833.
10. *Negligence—Persons on Track—Trespasser—Infants—Misrepresentation as to Age.*—A railroad company is liable for an injury inflicted upon one on its track, even though he were a trespasser, if, after it discovered his peril, or had such notice thereof as would put a reasonably prudent man on the alert to discover the same and avert the injury, it failed to do all within its power, consistent with its other duties, to avoid inflicting an injury upon him. The fact that the plaintiff was an infant and obtained employment with defendant through misrepresentation as to his age would not relieve the defendant from liability for an injury inflicted under such circumstances. *Norfolk & W. R. Co. v. Sollenberger*, 606.
11. *Negligence—Risk to Save Life—Self-Imposed Peril.*—The attempted rescue of one from a self-imposed peril by stepping onto a railroad track immediately in front of a rapidly approaching train, cannot excuse the negligence of the rescuer in remaining on the track till struck by the train. *Wright v. Atlantic Coast Line*, 670.
12. *Negligence—Sudden Emergency.*—An engineer of a rapidly moving engine who shuts off steam and applies his air brakes immediately when confronted with a sudden emergency, cannot be said to be guilty of negligence because he did not also use sand to stop his train. He has to deal with small frac-

tions of time, and cannot act with deliberation. *Norfolk & W. R. Co. v. Sollenberger*, 606.

13. *Nuisance—Absence of Negligence.*—A declaration which sets out a nuisance committed by a railroad company in its private capacity states a good cause of action, though no negligence be charged. *Terrell v. Ches. & O. R. Co.*, 340.
14. *Nuisance—Firing Up Engines—Site—Negligence.*—While it is necessary for a railroad company to fire up and clean its engines for the purpose of performing its public functions, yet, in selecting its site for doing such work, it is acting in its private capacity, and not in the performance of its public functions, and is liable, as a rule, for a nuisance resulting therefrom, even though the nuisance is not negligently caused. *Terrell v. Ches. & O. R. Co.*, 340.
15. *Nuisance—Terminal Yards—Injury to Neighbors.*—Although it may be difficult for a railroad company to find a suitable site for a permanent terminal yard on which it may do the necessary preparation of its engines for use, if it is held liable for damages to individuals who may complain of a private nuisance created thereby, still the law gives a remedy to every citizen for the wrongs he may sustain, even though inflicted by forces which constitute factors in the material development and growth of the country, and this remedy it is the duty of the courts to enforce. *Terrell v. Ches. & O. R. Co.*, 340.
16. *Personal Injury—Contributory Negligence.*—One who deliberately stands upon a railroad track in front of a rapidly approaching train, in plain view, and is struck by the train, is guilty of such contributory negligence as bars recovery. *Wright v. Atlantic Coast Line*, 670.
17. *Personal Injury—Contributory Negligence—Case at Bar.*—A brakeman of a railroad company who is seated in a place of safety in a coach, with no duties to perform until the coach is attached to a train, and who knows that the train of another company which usually attached the coach is being backed in to couple on to the coach and who hears its approach, but needlessly and carelessly steps out onto the platform just at the instant of impact and is knocked off and injured in consequence of the violence of the impact, is guilty of such contributory negligence as bars any recovery for his injuries. The doctrine of the "last clear chance" has no application to such a case. *Balto. & O. R. Co. v. Lee*, 305.
18. *Personal Injury—Failure to Carry Headlight—Instructions.*—In an action to recover for a personal injury inflicted at a grade crossing an instruction which tells the jury that if they "believe from the evidence that the injury to the plaintiff was caused solely by the failure of the defendant to have the usual and customary headlight on its engine, they must find for the

defendant, whether such failure was negligent or otherwise," is of very doubtful interpretation, and calculated to mislead the jury, and is, therefore, properly refused. This is especially true where the instructions already given clearly expound the law applicable to the case. *Norfolk & W. R. Co. v. Crowe*, 798.

19. *Personal Injury—Licensee on Track—Contributory Negligence—Plaintiff Last in Fault.*—The doctrine that a plaintiff may recover for an injury negligently inflicted on him by the defendant, notwithstanding his own contributory negligence, does not apply where the plaintiff's contributory negligence is, in order of causation, either subsequent to or concurrent with that of the defendant. Therefore, while one negligently walking upon a railroad is generally entitled to recover if an engineer, seeing him, makes no effort to check the train, he cannot recover if, after becoming aware of his danger, he makes no proper effort to escape. *Ches. & O. R. Co. v. Corbin*, 700.

20. *Personal Injury—Licensee on Track—Lookout—Negligence—Last Clear Chance.*—A licensee, walking on a railroad track at a point where the company owes him the duty of lookout, may recover for an injury inflicted on him by being struck by a train, notwithstanding his own negligence exposed him to the risk of injury, if the injury of which he complains was proximately caused by the omission of the defendant company, after having such notice of licensee's danger as would put a prudent man upon his guard, to use ordinary care for the purpose of avoiding such injury. It is not necessary that the company should actually know of the danger to which the licensee is exposed. It is enough if the engineer has sufficient notice or belief to put a prudent man on the alert, and he does not take such precautions as a prudent man would take under similar notice or belief. *Ches. & O. R. Co. v. Corbin*, 700.

21. *Personal Injury—Persons Standing Near Track—Contributory Negligence—Concurrent Negligence.*—A person who stands so close to a railroad track at a station that he is struck by the projecting portions of a passing engine, which could have been seen for a thousand feet before reaching the station, is guilty of such negligence as bars recovery. If it be conceded that the engineer in charge was guilty of negligence, still it was as much the duty of the person injured to care for his own safety as it was of the railroad company to look out for and avoid injuring him, and the mutual and concurring negligence of the parties at the time of the injury would bar a recovery. There can be no recovery when the negligence of both parties is concurrent and operative at the time of the injury, and contributes to it. It is not necessary that the negligence of the plaintiff should have caused the injury in order to bar his recovery. If

- it contributed proximately to it, he cannot recover. *Southern R. Co. v. Bailey*, 833.
22. *Persons Approaching Track—Presumption.*—A railroad company cannot be held liable for the failure of its engineer to anticipate that a person approaching a crossing is going to step upon the track immediately in front of a rapidly moving train, unless there is something to suggest to the engineer that such person does not intend to remain in a place of safety. He has the right to assume that the person is in possession of his faculties, and will retain his place of safety. *Wright v. Atlantic Coast Line*, 670.
23. *Persons on Track—Negligence of Railroad—Lookout—Proximate Cause.*—If those in charge of a train, in discharge of their duty to keep a lookout, discover, or should have discovered, a person upon the track, and there be superadded any fact or circumstance brought home to their knowledge sufficient to put a reasonable man upon his guard that the person upon the track pays no heed to his danger, and will take no step to secure his own safety, then the negligence of the person injured becomes the remote cause or mere condition of the accident, and the negligence of the railroad company the proximate cause, and there may be recovery. *Southern R. Co. v. Bailey*, 833.
24. *Rules Dispensing With Signals on Yards.*—The rules of two railroad companies occupying a joint yard that, in making up and shifting trains in the yard, there need be no white light displayed on the front of the leading car at night, nor any flagman with a signal, are reasonable, and will be upheld. *Balto. & O. R. Co. v. Lee*, 305.
25. *Signal to Stop—Remaining on Track—Personal Injury.*—A signal to stop, given by a stranger, to a train which is under no obligation to stop, is no warning to the engineer that a person in a place of safety is going to step on the track immediately in front of the train, and the apprehension that he may do so cannot justify the person giving the signal in remaining on the track until struck by the oncoming train. *Wright v. Atlantic Coast Line*, 670.
26. *Sounding Whistles—Knowledge of Danger.*—A plaintiff cannot complain of the failure of the servants of a railroad company to sound the whistle of an engine if he has all the knowledge he would have had if the whistle had been sounded. The purpose of sounding the whistle is to give warning of an approaching train to those who are ignorant of its approach. *Wright v. Atlantic Coast Line*, 670.
27. *Specific Performance—Contract to Build County Road—Railroads.*—Where a railroad company has taken possession of and used for its purposes a county road, and has undertaken to

build another equally as good and according to certain specifications, a court of equity will compel the performance of its contract. *Norfolk & W. R. Co. v. Supervisors*, 95.

28. *Specific Performance—Restoring Highway—Railroads.*—A court of equity will compel a railroad company to perform its plain statutory duty of restoring a highway which it has invaded to its former state of usefulness, as a condition to using it for the purposes of its roadbed. A railroad company cannot invade a highway with its track without complying with the law which grants the privilege to do so. *Norfolk & W. R. Co. v. Supervisors*, 95.
29. *Use of Public Highway—New Road—Duty to Construct—Liability of Purchaser of Property and Franchises.*—The duty of building a new public road in lieu of a public road taken by a railroad company for its purposes rests upon the railroad company, and, if not performed by it, the responsibility passes, under the statute of this State, to its successor who has purchased its property and franchises, and is bound to perform "all such duties as could have been required of the first company." *Norfolk & W. R. Co. v. Supervisors*, 95.
30. *Yards—Dispensing With Signals—Notice to Employees.*—It is unnecessary to ring a bell, sound a whistle or display a light in order to give employees on a railroad yard warning of dangers with which they are already acquainted, and of which they have knowledge. *Balto. & O. R. Co. v. Lee*, 305.

See CARRIERS, 5; CONFLICT OF LAWS, 1; EMINENT DOMAIN, 2, 4, 5; EVIDENCE, 8, 10, 17; MASTER AND SERVANT, 8, 10, 11, 13, 14, 19, 23; NEGLIGENCE, 10, 11; WITNESSES, 8.

REASONABLE TIME. See LOGS AND LOGGING, 1.

RECITALS. See TAXATION, 14.

RECOUPMENT. See PLEADING, 23; PRINCIPAL AND AGENT, 2, 3.

## REFORMATION.

1. *Presumption—Burden of Proof—Case in Judgment.*—While courts of equity have jurisdiction to reform written instruments on the ground of mutual mistake, yet the presumption is that the writing speaks the final agreement of the parties, and the burden is on the complainant to overcome this presumption, and to do so the mistake must be plain and established by the clearest and most satisfactory proof. In the case in judgment the evidence, taken as a whole, decidedly preponderates in favor of the deed in controversy as the final

consummation of the intention of the parties. *Percy v. First National Bank*, 129.

See SPECIFIC PERFORMANCE, 2.

#### REGISTRY.

1. *Constructive Notice—Description of Property.*—In order that the registry of a conveyance may operate as constructive notice to subsequent purchasers and incumbrancers the instrument must afford the means of not only ascertaining with accuracy what property is conveyed or affected by the instrument registered, and where it is, but its language must be such that, if a subsequent purchaser or incumbrancer should examine the instrument itself, he would obtain thereby actual notice of all the rights which were intended to be created or conferred by it. *Nat'l Cash Register v. Burrow*, 785.

See DEEDS, 2; SALES, 1, 2.

RELEASE. See CONTRACTS, 9.

REPUTATION. See WITNESSES, 1.

#### RESCISSION.

1. *Laches.*—The general doctrine is that a suit for rescission is the counterpart of a suit for specific performance. Both are addressed to the sound discretion of the court, and in neither will relief be granted to one who has been guilty of inexcusable delay in asserting the right. *Hagan v. Taylor*, 9.
2. *Proof Required—Specific Performance.*—A party seeking, as plaintiff, to rescind a contract is required to make out a stronger case for the relief sought than he would be required to make if, as defendant, he were resisting specific performance of the same contract. Upon the same facts proved, he might succeed as defendant in the latter case when he would fail as plaintiff in the former. *Hagan v. Taylor*, 9.

See APPEAL AND ERROR, 22; FRAUDULENT CONVEYANCES, 4.

RESCUE. See NEGLIGENCE, 12; RAILROADS, 12.

RESIDENCE. See DOMICILE, 1; TAXATION, 2, 10, 12.

#### RES JUDICATA.

1. *Partnership—Firm Assets—Note of Partner.*—The fact that an injunction obtained by a member of a dissolved firm against the prosecution of an action at law by the assignee of the firm,

on a note given by him to the firm, was subsequently dissolved and his bill dismissed does not establish the fact that the note was a partnership asset of the old firm, with respect to which there had been no settlement. *Summerson v. Donovan*, 657.

2. *Plea in Abatement—Non-Joinder of Partner as Defendant—Adverse Finding—Effect as Res Judicata.*—Where a defendant to an action on contract pleads in abatement that the contract was entered into by him on behalf of a firm composed of himself and another who should be united as a defendant, a finding against the defendant on this plea establishes the fact that the contract was made with the defendant personally and not with the firm, and that the plaintiff has the right to sue the defendant for a breach of the contract, but it does not determine that the defendant, in making the contract, was not acting for the firm. *Leterman v. Charlottesville L. Co.*, 769.

See JUDGMENTS, 4.

REVIVAL. See JUDGMENTS, 6, 7, 8, 9.

RICHMOND, CITY. See TAXATION, 3.

RIPARIAN RIGHTS. See NAVIGABLE WATERS, 2, 3, 4.

ROADS. See RAILROADS, 6, 7, 8.

ROANOKE CITY. See MUNICIPAL CORPORATIONS, 5.

SAFE APPLIANCES. See MASTER AND SERVANT, 14, 15.

SAFE PLACE. See MASTER AND SERVANT, 1, 9, 17, 18, 19, 20, 21.

## SALES.

1. *Reservation of Title or Lien—Description of Chattels.*—The memorandum required to be docketed under section 2462 of the Code, on a conditional sale of, or reservation of a lien upon, chattels, in order to operate as constructive notice to subsequent purchasers and creditors, must contain such a description of said chattels as will enable such purchasers and creditors, by examination of the records, to obtain actual notice of all the rights which were intended to be created or conferred by the instrument docketed. An instrument which leaves the designation of the specific property resting exclusively in the minds of the parties fails to meet the fundamental purposes and requirements of the registry law. The description of property cannot be arrived at by applying the testimony of the parties to the descriptive matter in the deed.



Such evidence is not in aid of something which requires explanation, but is supplying something which is entirely wanting. *National Cash Register v. Norfolk Realty Co.*, 791.

2. *Reservation of Title or Lien—Statutory Requirements—Constructive Notice—Case at Bar.*—Under the provisions of section 2462 of the Code, if a vendor of chattels wishes to retain the title to or a lien on such chattels, as against subsequent purchasers or creditors, the contract must be in writing, signed by the vendor and vendee, and the vendor must cause to be docketed and indexed “from the original contract” a memorandum setting forth the date of the contract, the amount due thereon, when payable, how payable, a brief description of the goods or chattels, and the name of the vendor and vendee. All of these requisites must be complied with in order that the docketing may constitute constructive notice. The docketing of a contract providing for notes payable in monthly installments after maturity of first note, but authorizing the purchaser to date the first note at such time as he may elect, and to insert the date either before or after the execution of the note, does not give notice of when and how the deferred payments are to be made, is not a sufficient compliance with the statute, and hence is not constructive notice. *National Cash Register v. Burrow*, 785.
3. *Passing of Title.*—When a contract is made for the purchase of an article hereafter to be delivered and paid for, so long as any act remains to be done by the vendor in order to put it into a state of readiness for delivery, the property does not pass to the buyer, but still remains at the risk of the seller. *Hawes & Co. v. Wm. R. Trigg Co.*, 165.
4. *Warranty of Fitness—Negligent Use—Personal Injury—Damages.*—Although the seller of a fuse may have warranted it to be fit for the purpose for which it was intended, and that no personal injury would be inflicted in consequence of any defect therein, still the right to recover for a personal injury inflicted on the purchaser in consequence of the use thereof is subject to the qualification that the purchaser must have used it in a reasonable, careful and proper manner, and that the damages sustained must have been such as might have been reasonably anticipated. *Cody v. Norton Coal Co.*, 363.

See INTERSTATE COMMERCE, 1; JUDICIAL SALES; REGISTRY, 1; SHIPPING, 1, 4.

SCIRE FACIAS. See JUDGMENTS, 6, 7, 8, 9.

SELF-IMPOSED PERIL. See RAILROADS, 12.

SET-OFFS. SEE APPEAL AND ERROR, 1, 20; PRINCIPAL AND AGENT, 2, 3.

## SHIPPING.

1. *Construction of Vessel—Completion and Delivery—Passing of Title.*—If in a contract for the construction of a vessel the parties intended that certain parts of the vessel should pass to the vendee as the work progressed and was paid for, it would have been easy for them to have so provided in the contract in express terms; but where the contract contains terms and stipulations wholly inconsistent with any such an intention, the general rule of law that no property in the chattel passes to the vendee till the chattel is completed and delivered, should and must prevail. *Hawes & Co. v. Wm. R. Trigg Co.*, 165.
2. *Construction of Vessel—Delivery—Passing Title.*—The right of the United States government to reject a vessel, or to annul the contract under which it was to be built, is wholly inconsistent with the idea that title had previously passed to the government, notwithstanding the fact that the contract provided for inspection by the government, payment by installments as the work progressed, and that all parts paid for under the system of partial payments should become thereby the sole property of the United States. *Hawes & Co. v. Wm. R. Trigg Co.*, 165.
3. *Construction of Vessel—Government Contracts—Partial Payments—Passing Title—Supply Liens—Code, Section 2485.*—Under a government contract with a manufacturing company for the construction of a vessel containing such provisions as are mentioned in the last paragraph above and providing for indemnity against loss of partial payments made, an uncompleted vessel in the hands of the company, upon which partial payments have been made, is not the property of the United States, but of the company, and is subject to the prior lien of supply creditors under section 2485 of the Code. The company could not avoid this lien, and the government cannot acquire any greater rights than the company had. *Hawes & Co. v. Wm. R. Trigg Co.*, 165.
4. *Construction of Vessel—Inspection—Payment of Installments—Passing Title.*—The title to a vessel to be built does not pass before completion merely because the contract provides for inspection by the intended purchaser and for the payment of installments as the work progresses. *Hawes & Co. v. Wm. R. Trigg Co.*, 165.
5. *Construction of Vessel—Government Contract—Passing Title—Lien for Supplies—Code, Section 2485.*—If, under a contract between a manufacturing company and the government of the United States for the construction of a vessel, the government

be considered as taking over the ownership of the vessel as payments therefor are made, the title passes subject to existing liens and encumbrances thereon; and if it be merely intended to provide for a lien on the vessel for money advanced in aid of its construction and equipment, whatever lien or liens the government acquires under the contract are *inferior* to the rights secured to the supply lien creditors of the manufacturing company under section 2485 of the Code. *Hawes & Co. v. Wm. R. Trigg Co.*, 165.

6. *Construction of Vessel—Title and Possession—Supply Liens—Demands of Creditors.*—When the title and possession of a vessel which a manufacturing company in this State is constructing for a purchaser have at all times been in the company, and were so at the time the assets of the company were placed in the hands of a receiver appointed in insolvency proceedings, the vessel is liable to the liens of persons furnishing supplies to the company, and to the demands of the general creditors of the company. *Hawes & Co., v. Wm. R. Trigg Co.*, 165.

See UNITED STATES, 4.

SICKNESS. See PLEADING, 9, 12.

SIGNALS. See RAILROADS, 30.

SOLDIERS. See ATTACHMENTS, 1.

#### SPECIFIC PERFORMANCE.

1. *Parol Agreement to Sell Land—Case in Judgment.*—In a suit for the specific performance of a parol agreement for the sale of land it must appear that the parol agreement relied on is certain and definite in its terms; that the acts proved in part performance refer to, result from, or were made in pursuance of the agreement proved; and that the agreement has been so far executed that the refusal of full execution will operate as a fraud upon the party, and place him in a situation which does not lie in compensation. In the case in judgment, if it be conceded that the vendor became engaged to and intended to marry the appellee (if he had lived), and that he promised to convey to her the real estate in controversy, still the evidence does not show that the acts of part performance were such as are required, nor that the agreement was so far executed that a refusal of full execution would operate as a fraud upon the appellee, and place her in a situation which does not lie in compensation. *Carter v. Jeffries*, 735.
2. *Reformation—Mistake—Burden of Proof—Case in Judgment.*—If, on a bill filed for the specific performance of a contract

for the sale of land, the defendant sets up the defense of mistake in the contract sued on, and asks that it be reformed before enforcement, the burden is on the defendant to prove the alleged mistake by clear, convincing and satisfactory evidence. If the proof is confused, conflicting and contradictory, relief will not be granted unless the mistake appears clearly and positively in spite of the conflict, and justice requires correction. In the case in judgment, the evidence of mistake is not such as to warrant relief on that account. *Perkins v. Herring*, 822.

3. *Rescission—Burden of Proof.*—In a suit for specific performance the burden of proofs is primarily upon the plaintiff to show that he is entitled to that redress. But where a suit for partition is based upon undisputed facts, and the defendants, by cross-bill, seek a rescission of the contract whereby they acquired title, based upon affirmative matters set up by their cross-bill, the burden of proof is on the defendants. *Hagan v. Taylor*, 9.

See APPEAL AND ERROR, 22; RAILROADS, 28, 29.

SPENDTHRIFTS. See FRAUD AND FRAUDULENT CONVEYANCES, 5.

#### STANDING TREES.

1. *Branding—Effect of Statute on Title—Statute of Frauds.*—The effect of the "Act to protect the owners of timber and logs from depredation" (Acts 1893-4, p. 513, Code [1904], sec. 1906-c) is to take a contract for the sale of standing timber which has been branded in accordance with the provisions of the act out of the operation of the statute of frauds, and to invest the purchaser with the absolute title thereto. The branding is made equivalent to a conveyance and delivery of the possession by the vendor to the vendee. The act, moreover, expressly includes trees branded before as well as those branded after its passage. *Hurley v. Hurley*, 31.
2. *Possession of Vendor—Statute of Frauds.*—A purchaser of standing trees, under a verbal contract, from one in possession thereof, who enters upon the land, cuts down the trees, carries them away and sells them, is bound to his vendor for the purchase price agreed to be paid therefor. *Hurricane Lumber Co. v. Lowe*, 380.
3. *When Considered Real Estate—Statute of Frauds.*—Independently of statute, a contract for the sale of growing trees, which are to remain upon the land for a time for the purpose of further growth and profit, is a contract for the sale of an interest in land, and must be proved by a writing. But if the trees are to be severed immediately, or within a reasonable or

convenient time, with a mere license to enter and take them away, without any stipulation for the beneficial use meanwhile of the soil, it is a sale of goods, and need not be in writing. *Hurley v. Hurley*, 31.

See APPEAL AND ERROR, 11; FRAUDS, STATUTE OF, 4; LOGS AND LOGGING, 1; TAXATION, 13.

#### STATE CORPORATION COMMISSION.

1. *Lack of Parties—Railroads—Appeal.*—Where a necessary party to the proceedings in a case before the State Corporation Commission has been omitted and not served with process, the cause will be remanded to the Commission without deciding any of the questions involved, in pursuance of section 156 (f) of the Constitution, for such further proceedings as may be necessary to a proper and final decision of the matters in controversy. *B. & O. R. Co. v. Commonwealth*, 215.

#### STATUTES.

1. *Actions Given by Statute—Effect of Repeal of Statute.*—A right of action that did not exist at common law, but depends solely upon statute, falls with the repeal of the statute, without a saving clause, unless reduced to judgment. If pending such action, before judgment, the law which gave the right to sue is repealed, without a saving clause as to pending suits, no further steps towards judgment can be taken in such suits. *Brown v. Western State Hospital*, 321.
2. *Construction—Exemptions.*—A statute exempting property from levy or sale is not to be construed strictly, but to carry out the obvious intent of the lawmaker. *Brown v. Western State Hospital*, 321.
3. *Joint Resolutions.*—The difference between an act of Congress and a joint resolution of the same body is that the former governs all persons under the jurisdiction of Congress, while the latter is but a rule for the guidance of the agents and servants of the government. *Hawes & Co. v. Wm. R. Trigg Co.*, 165.
4. *Repeal by Implication—Support of Insane Persons in State Hospitals—Acts of 1906 Repealed by Act of 1908.*—Where a later statute was plainly intended to embrace the whole legislation on the subject to which it refers, and to be wholly substituted for all former statutes on the same subject, it is a legislative declaration that whatever is embraced in it shall prevail, and whatever is excluded is discarded and repealed. In the case at bar the act of 1908 was intended to cover the whole subject of recovery of claims for the support of lunatics

confined in the State hospitals and to repeal the act of March 10, 1906 (Acts 1906, page 189), on the same subject. *Brown v. Western State Hospital*, 321.

See ASSIGNMENTS, 4; CONSTITUTIONAL LAW, 5, 6, 9; CONTRACTS, 4; TAXATION, 4, 7.

STATUTORY ACTIONS. See STATUTES, 1.

#### STREET RAILWAYS.

1. *Failure to Stop—Evidence of Prior Similar Failures.*—Evidence that an electric car did not stop, as it should have done, at a given point on other occasions prior to the accident under investigation, is admissible as tending to show a failure to stop on the occasion when the accident occurred. *Washington R. Co. v. Trimyer*, 856.
2. *Grade Crossings—Code, Section 1294-d (51) Not Applicable.* Section 1294-d (51) of the Code (1904) requiring railroad trains to stop at least fifty feet before getting to a grade crossing does not apply to street railways. *Washington R. Co. v. Trimyer*, 856.
3. *Grade Crossings—Care Required.*—A street railway company, as a carrier of persons, owes to its passengers a higher degree of care, upon approaching a grade crossing of a railroad than is required of a person, for his own protection, when driving an ordinary vehicle under like conditions. The latter must exercise ordinary care for his own protection, while the street railway company is liable for the slightest negligence on its part, and is bound to use the utmost care and diligence of a cautious person to protect its passengers from injury. *Washington R. Co. v. Trimyer*, 856.
4. *Grade Crossing—Collision—Contract Between Companies as Evidence.*—In an action by a passenger against a street railway company to recover damages for a personal injury inflicted in consequence of the alleged negligence of the defendant in coming into collision with an engine on a steam railroad, the contract between the two companies regulating the terms of crossing is not admissible in evidence to establish the degree of care which the carrier owed to its passenger, as that is fixed by law, but that part of it which regulates the terms of crossing is admissible to show that the negligence of the steam railroad company was the proximate cause and that of the carrier, if any, was only the remote cause of the injury complained of. *Washington R. Co. v. Trimyer*, 856.
5. *Grade Crossing—Joint Negligence—Carriers.*—A street car company which has negligently run one of its cars upon a grade crossing of a steam railroad cannot escape liability for a

resulting injury to one of its passengers by showing that the steam railroad company was also negligent in causing the collision. *Washington R. Co. v. Trimyer*, 856.

6. *Grade Crossing—Negligence Per Se—Question for Jury.*—It was error, in the case at bar, to instruct the jury that it was negligence as a matter of law for the street railway company to fail to stop its car at least twenty feet before getting to a grade crossing of a steam railroad. It was the duty of the street railway company to use the utmost care and diligence of a cautious person for the protection of its passengers, but it was for the jury to say whether or not, under all the circumstances of the case, it had fulfilled the measure of its duty. *Washington R. Co. v. Trimyer*, 856.

See ARBITRATION AND AWARD, 1; MUNICIPAL CORPORATIONS, 4.

STREETS. See MUNICIPAL CORPORATIONS, 1, 2.

#### SUBROGATION.

1. *Payment by Widow of Husband's Debts.*—A widow who has paid off debts of her deceased husband out of her own estate will be subrogated to the rights of her husband's creditors against his estate to the extent of such payment. *Brown v. Orr*, 1.

See HOMESTEAD, 1.

SUPERVISORS. See COUNTIES, 2.

SUPPLY LIENS. See ASSIGNMENTS, 3; SHIPPING, 3, 5, 6; UNITED STATES, 3, 4, 5.

SURETY. See PRINCIPAL AND SURETY.

SURVIVAL OF ACTIONS. See DEATH BY WRONGFUL ACT, 5.

#### TAXATION.

1. *Amount—Legislative Discretion—Power of Courts—Municipal Corporations.*—The power of taxation, under our system of government, rests with the legislative and not with the judicial department, and its province cannot be invaded by the courts. Where the power to tax for revenue purposes exists, the amount of the tax is in the discretion of the legislative body, and may be carried to any extent, within the jurisdiction of the State or corporation imposing it, which the will of such State or corporation may prescribe. If the power is exercised in an unwise, unjust or oppressive manner to any particular class, the appeal must be to the justice and patri-

otism of the representatives of the people, and not to the courts. *Bradley v. Richmond*, 521.

2. *Bank Deposits—Non-Residents—Code, Sections 487 and 489.*—Sections 487 and 489 of the Code (1904) are only applicable to residents of this State. Under these sections money belonging to such residents, whether deposited in bank in or out of this State, is taxable here, but general deposits by non-residents of their own money in a bank of this State are not taxable here. *Pendleton v. Commonwealth*, 229.
3. *City of Richmond.*—The City of Richmond has plenary powers of taxation upon all property and subjects assessed with State taxes against persons residing therein; hence this case is ruled by *Myers v. Commonwealth*, ante, p. 600. *Myers v. Richmond*, 605.
4. *Date of Assessment of Lands—February 1—Construction of Statutes.*—The revenue system of the State must be considered as a whole, and the various sections of the statutes which are *in pari materia* must be read together in order to ascertain their true meaning and intent. So reading chapter 24 of the Code, it appears that the beginning of the tax year for the assessment of taxes on real estate is February 1, and that the person who owns land on that date is the one to whom the land is to be assessed for taxes for the year thence next ensuing. *Tiller v. Excelsior Coal Co.*, 151.
5. *Delinquent Taxes—Sale of One Tract for Taxes on Another.*—It is not permissible for a treasurer to sell the mineral lands of an owner, which are not delinquent, to pay delinquent taxes on other lands held in fee by the same owner. *Tiller v. Excelsior Coal Co.*, 151.
6. *Double Taxation—Subjects Held by Different Titles.*—Taxation is not double where the subject is held by different titles. Both debtor and creditor may be taxed—the one on his property, and the other on his security—as in case of a mortgage, where the mortgagor is taxed on the full value of his property and the mortgagee on the full amount of his debt. *Myers v. Commonwealth*, 600.
7. *Funds in Court Before Report of Debts.*—Under the provisions of the statutes of this State money arising from the sale of a debtor's personal property at the suit of creditors, and on deposit in bank, is amenable to taxes before a report of debts has been made, but not after. *Myers v. Commonwealth*, 600.
8. *Injunction Against Illegal Tax—Complete Relief.*—The jurisdiction of a court of equity to enjoin the collection of an illegal tax is well settled in this State, and, having acquired jurisdiction for this purpose, it is proper for the court to settle fully the rights of the parties with respect to the entire subject matter of the litigation. *Tiller v. Excelsior Coal Co.*, 151.



9. *Licenses—Licenses and Ad Valorem Not Double Taxation.*—It is not double taxation to impose a license tax on a business, and at the same time to tax the capital used by the *ad valorem* system. *Bradley v. Richmond*, 521.
10. *Personal Taxes—Residence—Non-Residents.*—The question of personal taxation is to be determined by a person's residence and not by his citizenship, and is not affected by section 40 of the Code relating to expatriation. The State has no jurisdiction to assess a tax as a personal charge against a non-resident, nor, as a general rule, can the personalty of a non-resident be taxed unless it has an actual *situs* within the State. *Pendleton v. Commonwealth*, 229.
11. *Power to Tax—Legislative Function—Interference by Courts.*—The power of taxation is an attribute of sovereignty, and, under our system of government, its exercise is vested exclusively in the legislative department; and when the power exists, the courts cannot interfere on mere questions of expediency. *Myers v. Commonwealth*, 600.
12. *Resident—Residence.*—The meaning of the words "resident" and "residence," as used in tax laws, depends upon no one fact or combination of circumstances, but must be determined from all the facts and circumstances taken together in each particular case. *Pendleton v. Commonwealth*, 229.
13. *Standing Trees—Assessment 1905—Act March 12, 1908—Constitutional Law.*—Where standing timber was properly assessed in 1905 in pursuance of section 171 of the Constitution, requiring the General Assembly to provide for the reassessment of real estate in the year 1905, and every fifth year thereafter, and the commissioner of the revenue, as required by section 509 of the Code (1904), merely followed that assessment in making out the land books for the year 1908, it is unnecessary to pass on the validity of the act of Assembly relating to that subject approved March 12, 1908, as the action of the commissioner was fully warranted by law independently of said act. *Camp Man. Co. v. Commonwealth*, 506.
14. *TAX SALES—Deed From Clerk—Recitals as Evidence.*—The recitals in a deed from a clerk of a corporation court to a purchaser from the Commonwealth of land previously sold for delinquent taxes and purchased by the Commonwealth and by it subsequently sold to such purchaser are at least *prima facie* correct under the terms of the statute, and are to be accepted as true in the absence of any evidence to the contrary. There is no doubt as to the power of the legislature to make such recitals *prima facie* evidence. *Wright v. Carson*, 498.
15. *Tax Sales—Sale in County—Land Subsequently Taken Into City—Where Application to Purchase to be Filed.*—Where land lying in a county adjacent to a city is returned delinquent for

taxes and is sold and purchased by the Commonwealth, and all the evidence of the various steps by which the title of the original owner was divested and placed in the Commonwealth is to be found in the clerk's office of the county court of the county, but subsequently the land is taken within the city limits pursuant to law, the application to purchase from the Commonwealth can only be made under the express terms of the statute, in the corporation court of the city wherein the land is situated, and not in the circuit court of the county wherein it was sold. *Wright v. Carson*, 498.

See BANKS AND BANKING, 1; CONSTITUTIONAL LAW, 3, 7, 8; COUNTIES, 1; DOMICILE, 1; INJUNCTIONS, 2; LICENSES, 1, 2, 4, 5.

**TAX DEEDS.** See TAXATION, 14.

**TAX SALES.** See TAXATION, 15.

**THREATS.** See CRIMINAL LAW, 5, 7, 8.

**TIME.**

1. *Computation—Excluding First Day.*—When an act is to be performed within a specified period from or after a day named, the rule is to exclude the first day designated, and to include the last day of the specified period. So computing the time there are not thirty days between February 8, 1907, at noon and ten o'clock P. M., March 10, 1907. *Homestead Ins. Co. v. Ison*, 18.

See CONTRACTS, 8; INSURANCE, 13; LOGS AND LOGGING, 1.

**TREASURERS.** See COUNTIES, 1.

**TREES.** See STANDING TREES.

**TRESPASS.**

1. *Right of Action—Equitable Owner in Possession.*—The owner of an equitable estate who is in possession may recover for damages to realty, and a judgment against such party in possession is *res judicata* as against the holder of the legal title. *Virginia R. Co. v. Jeffries*, 471.
2. *Right of Action—Unenforceable Contract Executed.*—Where a contract for the sale of land which did not comply with the statute of frauds has been subsequently executed, a purchaser in possession at and after the date of the contract may recover for the damages done to the land from and after such date. *Virginian R. Co. v. Jeffries*, 471.

3. *Wilfulness—Negligence—Failure to Prove Wilfulness—Surplusage in Declaration.*—Neither wilfulness nor negligence is necessary to make a trespass on real estate a tort, and when the owner brings his action therefor alleging that it was done wilfully and unnecessarily, and the proof fails to sustain this allegation, the owner is still entitled to recover actual damages on proof of the unintentional trespass. The words “wilfully and unnecessarily” may be stricken from the declaration as mere surplusage, without impairing the plaintiff’s pleading in the matter of setting out a good cause of action. *Ches. & O. R. Co. v. Greaver*, 350.

**TRESPASSERS.** See RAILROADS, 11.

### **TRIAL.**

1. *Agreement of Counsel—Withdrawal—Discretion of Trial Court.* It is within the discretion of the trial court to permit counsel for a party who has, through inadvertence, assented to a procedure injurious to his client, to withdraw that assent, and object, where it involves no such change of the situation as would operate prejudicially to the other party. If the discretion be abused, it may be corrected upon a writ of error. *Washington Park Co. v. Goodrich*, 692.

See APPEAL AND ERROR, 20; EVIDENCE, 7; PLEADING, 16.

### **TROVER.**

1. *Title of Plaintiff—Choses in Action—Unendorsed Check.*—The owner of evidences of debt, such as bills, notes, checks and the like, may maintain trover in his own name for their conversion, though he could not have maintained in his name an action on the instrument itself. Thus the owner of an unendorsed certified check, who is not the payee thereof, may maintain trover for its conversion, although he could not maintain an action on the check in his own name to recover its proceeds. Property in the plaintiff and the right to possession is all that is necessary to maintain trover. *White v. Bonney*, 864.

### **TRUSTS AND TRUSTEES.**

1. *Powers of Trustee—Powers of Guardians—Testamentary Trusts.* The rights and powers of an executor or trustee under a will who holds the title to the property are quite different from those of a guardian who has the mere custody and management of his ward’s estate, and the principles applicable to the latter relation and the decisions in relation thereto are not

controlling in cases arising out of testamentary trusts. *Shirkey v. Kirby*, 455.

See EQUITY, 3, 6; FRAUD AND FRAUDULENT CONVEYANCES, 5; HUSBAND AND WIFE, 2; PARTNERSHIP, 4, 5, 6.

ULTRA VIRES ACTS. See RAILROADS, 1.

#### UNITED STATES.

1. *Ceded Territory—Jurisdiction Over Residents—Service of Process of State.*—The reservation, in the deed of cession of land from this State to the United States, of the right to serve civil and criminal process of the State in the territory ceded does no interfere in any way with the supremacy of the United States over the territory ceded, but is permitted to prevent it from becoming an asylum for fugitives from justice. Such territory is no longer a part of the State, nor subject to the jurisdiction of its courts. Persons residing there are not citizens of Virginia. *Bank of Phoebus v. Byrum*, 708.
2. *Contracts—Construction.*—A contract between the United States government and a citizen or corporation for the building of a vessel for the use of the government or any department thereof differs in no essential features from a contract between two citizens, or between an individual citizen and a corporation. The rules of construction are the same in either case. *Hawes & Co. v. Wm. R. Trigg Co.*, 165.
3. *Contracts—Laws of State—Imputed Knowledge.*—When the United States government contracts with a manufacturing company in this State to build a vessel, it is charged with knowledge of the law of this State which gives to those furnishing supplies to the company a prior lien on its property not constituting a part of its plant. *Hawes & Co. v. Wm. R. Trigg Co.*, 165.
4. *Contract Lien—Lien for Supplies—Code, Section 2485.*—A lien for supplies furnished to a manufacturing company, perfected under section 2485 of the Code, and attaching to a vessel in process of building for the United States government, and before the government has acquired possession thereof, is superior to a contractual lien of the government for installments paid under a contract, reserving twenty-five *per cent.* on all payments, and requiring an indemnifying bond with good security, conditioned for the construction of the vessel according to contract, and to pay all persons supplying labor or materials in the prosecution of the work. The provisions of the contract indicate that the government contracted with reference to the statutory lien, and in subordination thereto. *Hawes & Co. v. Wm. R. Trigg Co.*, 165.

5. *Installment Payments—Collateral Security—Lien for Supplies—Priority—Code, Section 2485.*—Where the only lien which the United States government can assert to a vessel in course of construction by a manufacturing company is that of a collateral security for installment payments made during construction, such lien is inferior and subordinate to the lien given by section 2485 of the Code to persons furnishing supplies to the company for the construction of the vessel. *Hawes & Co. v. Wm. R. Trigg Co.*, 165.

See ASSUMPSIT, 2, 4; ATTACHMENTS, 1; SHIPPING, 2, 3, 5.

USAGE. See MASTER AND SERVANT, 19, 20, 22.

VARIANCE. See APPEAL AND ERROR, 11; JUDGMENTS, 4; PLEADING, 1.

VENDOR AND PURCHASER.

1. *Contracts of Hazard—Sale by the Acre—Presumption—Case in Judgment.*—Where parties contract for the payment of a gross sum for a tract of land upon the estimate of a given quantity, the presumption is that the quantity influenced the price, and that the agreement was not one of hazard. Whether it be a contract for a sale in gross or by the acre depends on the intention of the parties to be gathered from the language of the contract and the surrounding facts and circumstances, but the court will always construe it to be a contract for a sale by the acre, unless the contrary clearly appears. The evidence in this case shows a sale by the acre, and that both parties were in good faith mistaken as to the quantity actually in the tract. *McComb v. Gilkeson*, 406.
2. *Deficiency in Quantity of Land—Laches in Asserting Claim.*—There was no laches on the part of the purchaser, in the case in judgment, in asserting his claim for an abatement of the purchase price for land sold by the acre. He did so promptly on discovering the shortage. The suit in which the land was sold was still pending, all the parties were before the court, and a large part of the purchase money was still unpaid. *McComb v. Gilkeson*, 406.
3. *Deficiency in Quality of Land—Measure of Damages.*—The general rule of compensation or abatement for a deficiency in the quantity of a tract of land sold by the acre is according to the average value per acre of the whole tract, unless particular circumstances require a departure from that rule. *McComb v. Gilkeson*, 406.
4. *Sale of Land—Deficiency—Mistake—Rights of Infants.*—The principle upon which courts of equity grant relief in cases of deficiency in the estimated quantity upon the sale of lands is

that of mistake, and is as applicable where the rights of infants are involved as in other cases. An infant is as much bound as an adult by the decree of a court of equity which has jurisdiction of the subject matter and parties to the litigation. *McComb v. Gilkeson*, 406.

5. *Sale of Land—Deficiency—More or Less—Case in Judgment.*—The language "more or less" used in contracts for the sale of land must be understood to apply only to small excesses or deficiencies attributable to variations of instruments of surveyors, etc. The use of these terms repels the idea of a contract of hazard and implies that there is no considerable difference in quantity. A deficiency of ten acres in a tract of land represented as containing two hundred and forty-five and one-fourth acres is not the small deficiency attributable to a variation of instruments. *McComb v. Gilkeson*, 406.
6. *Sale of Land—Whether in Gross or by the Acre.*—Where an agreement is entered into for the payment of a gross sum for a tract of land upon an estimate of a given number of acres, the presumption is that the quantity influenced the price to be paid, and that it is a sale by the acre and not in gross, unless the contrary is made to appear plainly. A sale of a given number of acres, "more or less," will be construed to be a sale by the acre, unless it be clearly shown that a sale in gross was intended. While contracts of hazard are not invalid, they are not favored in courts of equity. *Pack v. Whiteacre*, 122.
7. *Sale by the Acre—Presumption.*—Courts of equity do not favor contracts of hazard, and every sale of real estate where the quantity is referred to in the contract, and the language of the contract does not plainly indicate that the sale was intended to be a sale in gross, is presumed to be a sale by the acre. The presumption against contracts of hazard can be effectually repelled only by clear and cogent proof, and the burden is always upon the party asserting a contract of hazard to clearly establish the assertion. *McComb v. Gilkeson*, 406.

See JUDICIAL SALES, 3; NUISANCE, 6; SPECIFIC PERFORMANCE, 1; STANDING TREES, 1, 2.

VENIRE FACIAS. See CRIMINAL LAW, 18, 19.

## VERDICTS.

1. *Contrary to Evidence—Evidence to Support—Probabilities.*—A verdict of the jury awarding damages for a nervous disorder resulting from a personal injury will not be set aside as contrary to the evidence when there is sufficient evidence for the jury to have concluded that the nervous disorder complained

of was more probably due to the injuries received than to any other cause. *Norfolk & W. R. Co. v. Spears*, 110.

2. *Evidence to Support*.—The verdict of a jury should not be set aside when the evidence before the jury was ample to sustain their findings. *Ches. & O. R. Co. v. Greaver*, 350.
3. *Quotient—Impeachment by Jurors*.—If jurors agree in advance that each shall put down the amount of his verdict and the aggregate of the sums put down shall be divided by the number of jurors and the quotient be their verdict, this invalidates the verdict if established by competent evidence, but the evidence in the case at bar is not sufficient to establish that fact, and generally jurors should not be permitted to testify to their own misconduct in the jury room. *Washington Park Co. v. Goodrich*, 692.

See APPEAL AND ERROR, 6, 8, 9, 23, 24, 25; BOUNDARIES, 1; CRIMINAL LAW, 3, 14; DAMAGES, 2, 3, 4, 5, 7; EVIDENCE, 13, 17; INSTRUCTIONS, 1, 12; NEGLIGENCE, 3, 8; NEW TRIAL, 1, 2, 3, 4; PLEADING, 15, 16.

VICE-PRINCIPAL. See MASTER AND SERVANT, 4.

WAIVER. See ASSIGNMENTS FOR BENEFIT OF CREDITORS, 1; ASSUMPSIT, 2; BILLS AND NOTES, 1; CARRIERS, 2; CRIMINAL LAW, 14; EVIDENCE, 4, 12; FRAUD AND FRAUDULENT CONVEYANCES, 4; FRAUDS, STATUTE OF, 2; JUDGMENTS, 2; WITNESSES, 9.

WARRANTY. See SALES, 4.

WATERS AND WATERCOURSES. See MUNICIPAL CORPORATIONS, 5, 6; NUISANCE, 5.

## WILLS.

1. *Child—Descendants—Defeasible Fee—Case in Judgment*.—A testatrix bequeathed property to her two grandsons, A and B, to be equally divided between them, "and if either of my grandsons should die leaving no child or descendants surviving him, the share he receives under this will is to go to his surviving brother, and if both of my grandsons die, leaving no child or descendants surviving them, then the whole of what is herein given shall be equally divided between" my children. A died without issue, B is still living and has living children.

*Held*: The words "child" and "descendants," in the connection here used, are not words of purchase, creating an estate in the class designated, but are words of limitation, which serve to limit or describe the estate given. A and B each took defeasible fees. Upon the death of A without issue, the estate given

to him passed to B, subject to the same condition. In no event can the children of B take anything under the will of the testatrix. If they survive their father his defeasible fee is converted into a fee simple, which, if undisposed of, they will take by *inheritance from their father, but not by purchaser under the will of the testatrix*. If, however, B is not survived by any child or descendant, the estate will pass under the ulterior limitation to the children of the testatrix. *Pettyjohn v. Woodruff*, 77 Va. 507, criticised. *Daniel v. Lipscomb*, 563.

2. *Construction—Devise for Life—Power Over Fee.*—A devise of an estate for life, coupled with absolute power of disposition, either express or implied, comprehends everything, and the devisee takes the fee. This is now a canon of property in this State. *Miller v. Porterfield*, 86 Va. 881, overruled. *Hansbrough v. Presbyterian Church*, 15.
3. *"Dying Without Heirs"—Code, Sec. 2422—Perpetuities.*—The purpose of the statute (Code, sec. 2422) construing the phrase "dying without heirs" and similar expressions is to effectuate the intention of the testator by rendering valid a limitation which would have been otherwise invalid as violative of the rule against perpetuities. Since January 1, 1820, words which had previously been construed to mean an indefinite failure of issue are now construed to mean a *definite* failure of issue, and the limitations founded thereon are no longer void for remoteness. *Daniel v. Lipscomb*, 563.
4. *Probate—Copy of Will Probated in Another State—Authentication—Collateral Attack.*—A sentence pronounced by a court having jurisdiction, whether it be admitting a paper to probate or excluding it from probate, as long as it remains in force, binds conclusively not only the immediate parties to the proceeding in which the sentence is had, but all other persons and all other courts. It cannot be collaterally attacked. The same rule applies to the probate of an authenticated copy of a will admitted to probate in another State. The fact of the due authentication of the copy is determined by its admission to probate, and this determination is conclusive on all persons and all courts until it is reversed in some appropriate proceeding. It cannot be collaterally assailed. *Bryan v. Nash*, 329.

#### WITNESSES.

1. *Character—General Reputation.*—Witnesses as to general character of a party must speak of his general reputation among the people who know the party, and not as to special reputation formed on a single occasion. *Homestead Ins. Co. v. Ison*, 18.
2. *Competency—Grand Juror.*—A grand juror may be called and examined on behalf of the accused to prove that the testimony



of a witness called and examined on behalf of the Commonwealth on the trial of a case is in direct conflict, upon a material point, with the testimony given by that witness before the grand jury. *Harris' Case*, 905.

3. *Disqualification—Perjury—Conviction in Federal Court—Testimony in State Court.*—A witness convicted of perjury in a United States court sitting in this State is not thereby disqualified from testifying in one of the courts of this State. The Federal statute expressly limits the disqualification to "giving testimony in any court of the United States," and the Virginia statute intended only to disqualify persons convicted of perjury in a court of this State. Neither the Federal statute nor the State statute intended to impose, or could impose, the punishment prescribed by the order. *Samuels' Case*, 901.
4. *Experts—Decision of Trial Court—Case at Bar.*—Whether or not a witness is an expert is a question for the trial court, subject to a review on appeal under the limitations applicable to the review of the exercise of discretion. In the case at bar, the trial court was satisfied with the qualifications of the witness, and this court is unable to say, as a matter of law, that its discretion was improperly exercised. *Hot Springs L. Co. v. Revercomb*, 240.
5. *Experts—Hypothetical Questions—Facts Assumed.*—A hypothetical question propounded to an expert witness will not be rejected for lack of fulness of details when there is evidence tending to prove all the facts assumed in the question, and it refers to all the material facts which the evidence tends to prove affecting the question upon which the expert is asked to express an opinion. *Norfolk & W. R. Co. v. Spears*, 110.
6. *Experts—Opinions—Floatable Streams.*—A witness who has made the floating of logs a part of the business of his life, and who possesses an intimate acquaintance with the stream with reference to which he testifies, and a thorough knowledge of the uses to which it is sought to be applied, may give his opinion as to whether or not the stream is floatable. Such opinion would be of distinct value to the jury in arriving at a correct conclusion, and in no other way could he convey to the minds of a jury of ordinary experience and average intelligence a correct and intelligent appreciation of the stream. For an elaborate discussion of opinion evidence, see opinion of the court. *Hot Springs L. Co. v. Revercomb*, 240.
7. *Experts—Opinions—When Not Admissible.*—Generally the opinions of witnesses are inadmissible in evidence. Witnesses can testify to facts only, and not to opinions or conclusions based on facts. If all the relevant facts can be, or have been, introduced before the jury, and they are able to deduce a reasonable inference from them, no reason exists for receiving opinion evidence, and it is inadmissible. *Atlantic Coast Line v. Cable*, 514.

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8. *Nuisance—Evidence—Opinion—Statement of Facts.*—Upon a complaint that a roundhouse of a railroad company and the short tracks adjacent thereto, are a private nuisance, a witness who is thoroughly familiar with the company's property, the necessity for roundhouse facilities and the convenience of the location for the same, may testify as to the necessity for the use made by the company of its roundhouse and the short tracks adjacent thereto. This is a statement of facts. *Ches. & O. R. Co. v. Greaver*, 350.
9. *Objection to Question—Subsequent Admission of Same Question—Waiver.*—An objection to a question propounded to a witness will be deemed to have been waived, where subsequently, in the examination of the witness, practically the same question was permitted to be asked and answered without objection. *Ches. & O. R. Co. v. Greaver*, 350.
10. *Opinions—Custom of Business—Location of Dynamite Thawer.* Where the negligence charged against a mining company is that it placed its dynamite thawer in dangerous proximity to its employees, a witness who is experienced in such matters may be asked by the plaintiff what distance it was customary for miners to place their dynamite thawer from the men at work. If he answers "a safe distance," he may be asked further to explain what he means by "a safe distance," as the answer stating the distance is not the expression of an opinion by the witness, but a statement of what the customary distance was. *Cook Mining Co. v. Thomas*, 369.
11. *Privilege—Self-Incrimination—Limited Answer.*—A witness may decline to answer any question when the answer may tend to incriminate him. This privilege is guaranteed to him by the Constitution. Nor is the right to decline to answer at all affected by the suggestion of the judge that he might answer yes or no, without giving any reason for his answer. *Edmonston's Case*, 897.
12. *Refreshing Memory—Unenforceable Contract—Best Evidence of Date.*—Where it is material to show the date of the sale and delivery of possession of real estate in an action by the purchaser against a wrongdoer, the contract of sale, though unenforceable in equity, is admissible in evidence as a memorandum to refresh the memory of the vendor who is examined as a witness on behalf of such purchaser, and also as the best evidence of such date. *Virginian R. Co. v. Jeffries*, 471.
13. *Surprise—Prior Inconsistent Statements—Code, Section 3351.* Under the provisions of section 3351 of the Code (1904), a witness introduced by the Commonwealth having turned out to be adverse, and his evidence having taken the Commonwealth by surprise, it was proper, after laying the foundation therefor,

to prove a prior inconsistent statement made by him, and to instruct the jury that his evidence, so far as it contradicted any statement of any witness introduced by the defense, was proper rebuttal, and that the evidence of his prior inconsistent statement only went to his credibility, and affected his veracity and truthfulness. *Hardy's Case*, 910.

See EVIDENCE.

WOOD ALCOHOL. See INTOXICATING LIQUORS, 4.













